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**COMPARATIVE STUDY: THE MILITARY JUSTICE  
SYSTEM IN GHANA AND THE UNITED STATES (PRE-  
TRIAL THROUGH POST-TRIAL): NEED FOR REFORMS  
IN GHANA'S MILITARY JUSTICE SYSTEM**

A Thesis Presented to The Judge Advocate General's School  
United States Army in partial satisfaction of the requirements  
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY COLONEL THOMAS ALLOTEY  
GHANA ARMED FORCES

49<sup>TH</sup> JUDGE ADVOCATE OFFICER GRADUATE COURSE  
APRIL 2001

**COMPARATIVE STUDY: THE MILITARY JUSTICE SYSTEM IN  
GHANA AND THE UNITED STATES (PRE-TRIAL THROUGH POST-  
TRIAL). NEED FOR REFORMS IN GHANA'S MILITARY JUSTICE  
SYSTEM**

Colonel Thomas Allotey

## Abstract

My thesis examined the military justice system in Ghana and made proposals towards reforming the system. In order to put the examination in the right context, the paper traced the history of the civilian justice system together with the military justice system and showed areas where the two systems co-operated.

Both systems were founded on the English common law. Part II of the paper highlighted the colonial administration of the British and the introduction of the English judicial system into then Gold Coast. It may be noted that the development of the Ghana Armed Forces had its roots in the West African Frontier Force established by the British to maintain security around their settlements in the coastal areas of the present central regions of Ghana.

Initially, it was the British Army Act of 1955 which was used to administer the military. After Ghana achieved her independence in 1957, the Armed Forces Act was enacted. It created various offenses and military tribunals to deal with offenders. Regulations were also made which detailed the procedures to be used at various service tribunals. At present there are four service tribunals: two disciplinary boards at battalion and brigade levels exercise summary jurisdiction in certain cases; and two courts-martial.

Part III of the paper examined the deficiencies in the military justice system in Ghana. It indicated that even though the Constitution of Ghana has provided certain guarantees, it does not appear that the service member enjoys the benefits. For example, the paper pointed out that pre-trial procedures in the military justice system do not afford the service member accused of an offense the adequate facilities to prepare his defense. At the investigation level or the taking of a summary of evidence, the accused is not represented by counsel. He is allowed to conduct his cross-examination.

Furthermore during a trial by court-martial, the military does not provide him with counsel. He has to hire the services of a civilian legal practitioner. Ghana's Parliament expressed concern about these anomalies and called on the military authorities to address the problems. In addition, the Office of the Judge Advocate General and the Directorate of Legal Services need to be re-structured to meet the expanded roles and functions of the armed forces.

Part IV of the paper considered certain provisions of the US Uniform Code of Military Justice which would be relevant to the needs of the military justice system in Ghana. For instance, providing defense counsel to accused service members has been found to enhance military justice.

The paper also looks at the impact of the new proposals and the regulatory mechanics to effect amendments to the laws and regulations in Ghana. Finally, the paper recommends areas where reforms are imperative.

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COMPARATIVE STUDY: THE MILITARY JUSTICE SYSTEM IN GHANA  
AND THE UNITED STATES (PRE-TRIAL THROUGH POST-TRIAL).  
NEED FOR REFORMS IN GHANA'S MILITARY JUSTICE SYSTEM

Colonel Thomas Allotey <sup>1</sup>

*I agree that it will be a great error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.*

*The object of civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men so as to be capable of exercising the largest measure of force at the will of the nation.<sup>2</sup>*

I. Introduction

Over fifty years ago, the military justice system in Ghana generally reflected the above-mentioned quote. By enlisting in the armed forces, a soldier ipso facto deprived

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<sup>1</sup> Director, Legal Directorate, General Headquarters, Ghana Armed Forces. Currently, a student in the 49<sup>th</sup> Graduate Course, TJAGSA, Charlottesville, Virginia. B.A and LL.B., University of Ghana, 1966 and 1970 respectively; Counselor at Law (C.L), Ghana Law School, 1972; Junior Staff College, 1980; Senior Staff College, 1988; Law of Armed Conflict (LOAC) Course, Madrid, Spain, 1996; Assistant Director, Legal Directorate, 1973-1978; Station Legal Adviser, Western Command, 1979-1983; deployed to United Nations Interim Force in Lebanon (UNIFIL) as Legal Adviser, Ghana Battalion, 1981-82; Deputy Director, Legal Directorate, 1983-1990. Deployed to UNIFIL HQ as Chief Military Press Information Officer, Jan.-Oct.1990; Director, Legal Directorate, 1991-2000; Honorary Legal Advisor, Ghana Red Cross Society, 1997-2000. Conferences and seminars on LOAC and World Veterans Federation: Kenya, 1986; Portugal, 1992; Geneva, 1994; France, 1994; Cote d' Ivoire, 1994; Korea, 1996; Morocco, 1998. Association of Military Christian Fellowships Conferences: Benin, 1991; White Sulphur Springs, Pennsylvania, 1993; Virginia Beach, Virginia, 1994; Nigeria, 1997.

<sup>2</sup> Brigadier-General (Ret.) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, Army Lawyer, Mar.2000, at 1 n. 1 (quoting General William T. Sherman).

himself of his rights and liberties. In short, the military then was command-based, and the aim of the military justice system was directed more towards discipline. This was exemplified, among other things, in the way an accused service member was arraigned before his commanding officer for trial. The bugle would sound and the accused would be marched in double quick time. The unit Chief Warrant Officer would be behind the accused with his pace stick, ready to use it on the accused as and when he deemed fit, especially, when the accused tried to offer explanation for his conduct.

The whole trial process was characterized by tension and fear. Under such circumstances justice was a secondary consideration. Though there have been some changes in recent years, there is much to be done to enhance the military justice system and ensure that justice is given due consideration.

It is observed, at the outset, that the military justice system in Ghana is inextricably linked with the country's judicial system that owes its birth to Ghana's colonial history. Indeed, there is generally a correlation between Ghana's judicial system and the military justice system. For example, the Chief Justice, who is the head of the Judiciary, appoints judge advocates (military judges) to officiate at courts-martial. Furthermore, the judicial system has been based largely on the principles of English common law and doctrines of equity.<sup>3</sup> The military justice system in Ghana has also

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<sup>3</sup> BLACK'S LAW DICTIONARY 270 (7<sup>th</sup> ed. 1999) defines the common law as "the body of law deriving from law courts as opposed to those sitting in equity.... The common law of England was one of the three main historical sources of English law. The other two were legislation and equity. The common law evolved from custom and was the body of law created by and administered by the King's courts. Equity developed to overcome the occasional rigidity and unfairness of the common law. Originally the King himself granted or denied petitions in equity, later the task fell to the chancellor, and later still to the Court of Chancery." *Id.*



been tailored to the British military justice system. In fact, until Ghana achieved her independence in 1957, the British Army Act of 1955 was used to administer the Ghana armed forces.

Ghana's court structure more or less followed the English court structure. Ghana's superior courts of judicature consisted of the Supreme Court, the court of appeal, and the high court. The circuit and magistrate courts were at the bottom of the judicial hierarchy.

Political and social dynamics of the country affected not only the judicial machinery but also impacted greatly on the military justice system. From 1957, when Ghana achieved her independence, to 1981 there were four military interventions in the administration of the country.<sup>4</sup> After the 1981 military take-over, the government introduced many far-reaching measures including the tribunal system, which affected the judiciary and the military justice system.<sup>5</sup>

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<sup>4</sup> U.S. DEP'T OF ARMY, PAM. 550-153, GHANA A COUNTRY STUDY (Nov. 1994) [hereinafter DA PAM. 550-153] 270-274. (1) On February 24, 1966, the military ousted the government, accusing it of "abuse of power, widespread political repression, sharp economic decline, and rampant corruption." The new government, which operated under the name, National Liberation Council (NLC), handed over power after general elections in 1969. (2) On January 13, 1972 the military seized control of the government for the second time under the name, National Redemption Council (NRC). The government led by then Colonel Acheampong decided to form a union government composed of civilians, military and police personnel. It changed its name to the Supreme Military Council. There was wide-spread opposition to the union government proposal. In a palace coup on July 5, 1978 Acheampong was forced to resign and General Akufo formed the new administration under Supreme Military Council II. (3) Ghana's third military take-over occurred on June 4, 1979, when Rawlings was ushered into power. He formed the Armed Forces Revolutionary Council (AFRC) that ruled the country for three months. No sooner had the new civilian administration taken over reigns of government than Rawlings came into power for the second time. (4) On December 31, 1981, Rawlings seized power and established the Provisional National Defense Council (PNDC) that governed the country until 1992 when a new civilian democratic government was elected.

<sup>5</sup> The Provisional National Defense Council (Establishment) Proclamation, §§ 9, 10 (1981) [hereinafter P.N.D.C. Proclamation] state:

9. (1) Notwithstanding the suspension of the 1979 Constitution and until provision is otherwise made by law—

Before the introduction of the tribunal system in Ghana, the high court, circuit and magistrate courts were presided over by sole judges. After the establishment of the tribunal system the orthodox courts were marginalized. The tribunals were, however, given prominence and high-profile cases were sent there. The rippling effect of this change upon the military justice system was the establishment of armed forces disciplinary boards to try offenses, instead of commanding officers trying cases alone.

Despite these changes, which happen to make the military justice system more fair, presently an accused service member at a trial (battalion or brigade level) has no right to counsel even though the Constitution of the Republic of Ghana provides for such representation.<sup>6</sup> Additionally, an accused tried summarily has no right of appeal.<sup>7</sup>

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- (a) all courts in existence immediately before the 31<sup>st</sup> day of December, 1981, shall continue in existence with the same powers, duties and functions under the existing law subject to this Proclamation and laws issued thereunder.

10. (1) Notwithstanding the provisions of section 9 of this Proclamation, there shall be established independently of the said courts, Public Tribunals for the trial and punishment of offenses specified by law.

10. (2) Notwithstanding the provisions of section 9 of this Proclamation the Public Tribunals established under subsection (1) of this section shall not be subject to the supervisory jurisdiction of any court and accordingly it shall not be lawful for any court to entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition, quo warranto injunction or declaration in respect of any decision, judgment, finding, ruling, order or proceeding of any such Tribunal.

*Id.*

<sup>6</sup> GHANA CONST. art.19. The article states among other things, the following:

19. (1) A person charged with a criminal offense shall be given a fair hearing within a reasonable time by a court.

(2) A person charged with a criminal offense shall— . .

(d) be informed immediately in a language that he understands, and in detail, of the nature of the offense charged;

(e) be given adequate time and facilities for the preparation of his defense;

(f) be permitted to defend himself before the court in person or by a lawyer of his choice;

However, an accused service member before a court-martial has both the right to counsel and right of appeal. Interestingly, the military does not provide him with any defense counsel. He has to secure the services of a private legal practitioner. It is contended that a civilian defense counsel may not be conversant with the military law and procedures, and may therefore not be effective in assisting the accused in preparing his defense.

It is interesting to note that Ghana's Parliament has identified certain shortcomings in the military justice system and has called for, among other things, the establishment of an office to provide accused service members with defense counsel.<sup>8</sup>

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(g) be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on the same condition as those applicable to witnesses called by the prosecution . . . .

. . . .

(21) For the purposes of this article "criminal offense" means a criminal offense under the laws of Ghana.

*Id.*

<sup>7</sup> The Armed Forces Act (Act 105) as amended, [hereinafter Act 105] provides at section 90 as follows:

Every person who has been tried and found guilty by a court martial shall have a right to appeal to the Court Martial Appeal Court, in the form, manner and within such time as may be prescribed in respect of either or both the following matters:

- (a) the legality of any or all of the findings, and
- (b) the legality of the whole or any part of the sentence.

*Id.*

<sup>8</sup> GHANA PARL. DEB (4<sup>th</sup> ser.) (1997) 21, col. 936 [hereinafter GHANA PARL. DEB.]. Parliamentarian Joseph Darko-Mensah states, *inter alia*,

The offenses established under the Armed Forces Act, 1962 (Act 105) and the Regulations under Act 105 are such that there is an urgent need to establish Ghana Armed Forces Defense Counsel office under the legal directorate of the Ghana Armed Forces to undertake the defense of all those who are subject to the code of service discipline. [P]unishments established under the Act are mostly punitive except few, for example, punishments ranges from death penalty, life imprisonment, two to ten years imprisonment, detention for ninety days and dismissal with disgrace....And in some cases punishment of detention also includes punishment of reduction in rank....The

Again, during the taking of summary of evidence, the accused is not represented.<sup>9</sup> Therefore, the lack of representation in Ghana's military justice system is an anomaly that must be addressed.

Selection of panel members for trials is another potential area for unfair practice. The unfairness includes undue command influence in the military justice system. At battalion level, the commanding officer may preside over a disciplinary board that he

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importance and the need for the establishment of this office is clear. I urge Parliament to press upon the Commander-in-Chief and the Ghana Armed Forces Command to adopt measures to engage defense counsels in the Armed Forces with the task of defending those who may require such services to avoid miscarriage of justice.

*Id.*

<sup>9</sup> GHANA ARMED FORCES REG. vol. II (1969) [hereinafter AFR vol. II] Article 109.02 (1) provides,

A summary of evidence, as distinct from an abstract of evidence, shall be taken if:  
(a) the maximum punishment for the offence with which the accused is charged is death, or  
(b) the accused, at any time before the charge against him is referred to higher authority, requires in writing that a summary of evidence be taken, or  
(c) the commanding officer is of the opinion that the interest of justice requires that a summary of evidence be taken.

*Id.* See also Note (d) to Article 109.02 which states:

An accused has no right to be represented at a summary of evidence, but the commanding officer may permit counsel or an officer who assisted the accused under Article 108.26 (Officer to Assist Accused) to be present to advise the accused. Neither counsel nor the officer will have any right to cross-examine witnesses.

*Id.* Compare the article above with Article 32 Uniform Code of Military Justice (UCMJ) investigation under the US military justice system, where

the accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. [Further], [t]he accused has the right to be represented at that investigation ... (and) full opportunity shall be given to the accused to cross-examine witnesses against him . . . .

U.C.M.J. art. 32 (2000).

appoints.<sup>10</sup> The commanding officer may, directly or indirectly, exercise undue influence on the panel by any statement he makes.

It may be of interest to note that the Ghana Armed Forces Legal Directorate organizes annual legal seminars for officers and enlisted service members. At one of these seminars in 1998, an officer, while contributing to the discussion on the trial process, made some revealing remarks. He said that on one occasion a disciplinary board convicted a sergeant. Later an enlisted member of the disciplinary board was alleged to have stated, "I wanted to be lenient to the convicted sergeant but could not because of a remark made by the commanding officer." This might be an isolated case. However, it shows the thinking of some members of disciplinary boards.

In the case of a court martial, a convening authority may exercise unlawful influence through various ways including: selection of panel members; comments or statements by the convening authority; and arbitrary discharge of panel members.<sup>11</sup> Post-trial comments by commanders or other senior officers on how a particular case has been determined are likely to impact on potential court members and defense witnesses.

Apart from procedural issues, the present Office of the Judge Advocate General and the Directorate of Legal Services, which serve as the pivot of the military justice

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<sup>10</sup> See Act 105, *supra* note 7, § 63 (1).

<sup>11</sup> In 1986, the author prosecuted a Lieutenant Colonel of the Ghana Army for fraudulent misapplication of military property under section 52 of Act 105; and neglect to the prejudice of good order and discipline under section 54. He was convicted on the latter offense and was awarded "loss of seniority." Two days later all the panel members were administratively discharged from the service for no stated reason.

system, need to be re-structured. These departments are not staffed adequately. For example, until recently, the law did not provide for expansion of the office of the Judge Advocate General.<sup>12</sup> With the expansion of the armed forces this office needs to be strengthened.

The military justice system in Ghana is deficient and must be reformed. Only reform that satisfies the aspirations of the Ghanaian populace, and brings the system more in line with the United States military justice system will remove the anomalies that undermine justice and fairness. Part II of this article examines the history of the civilian and military justice systems. Part III identifies the deficiencies in the military justice system that led to the conclusion that the only solution was complete reform. Part IV focuses on the American military justice system practice and procedures that should be adopted by Ghana. Further, Part V proposes statutory and regulatory mechanics of changing Ghana's military justice system. Part VI assesses the impact of change on the military justice system in Ghana. Finally, the article concludes with an overview of the military justice system in Ghana.

## II. History of the Ghana Civilian and Military Justice Systems

### A. The Civilian Justice System in Ghana (Gold Coast) Before Independence

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<sup>12</sup> See Act 105, *supra* note 7, § 73A (1) which states, "Notwithstanding anything in sections 68 and 73 of this Act, the Commander-in-Chief of the Armed Forces may, after consultation with the Chief Justice, appoint a person to be known as the Judge Advocate General of the Ghana Armed Forces to officiate generally at courts martial as a judge advocate and to perform such other functions as the Commander-in-Chief may from time to time assign to him."

The civilian justice system had its genesis in the British colonial administration of the Gold Coast (Ghana). Long before the Europeans came to Africa certain African kingdoms had flourished on the continent. Among the kingdoms that flourished in the West African sub-region was the ancient kingdom of Ghana. The kingdom engaged in trans-Saharan trade with ports in the Mediterranean region. This trade stimulated the growth of the state.

The borders of the kingdom were extensive. Further, the kingdom had a well-established system of administration. Above all, it was very rich.<sup>13</sup> However, by the fourteenth century the kingdom had disintegrated.<sup>14</sup>

Early contacts between the people of Ghana (Gold Coast) and Europeans began in the fifteenth century. The next three centuries saw the Portuguese, Danes, Dutch and the English struggling for political hegemony and economic influence among the indigenous people of the coastal areas.<sup>15</sup> The Portuguese, under the patronage of Prince Henry the

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<sup>13</sup> DA PAM. 550-153, *supra* note 4, at 5-7. Ghana was an ancient kingdom which flourished in the ninth century. Its rulers "were renowned for their wealth in gold, the opulence of their courts, and their warrior-hunting skills." Gold was one of the commodities that attracted the Europeans to this region of West Africa. The Portuguese and other Europeans named the area "The Gold Coast." After independence in 1957, the government reverted to the old name of Ghana. One of the components that would later make up Ghana was the state of Asante. Under militant leaders, the state expanded its influence, and established a strong centralized authority in the central forest zone of Ghana. The coastal areas were inhabited by the Ewes, the Ga-Adangbe and the Fante.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 8-9.

Navigator, were the first to arrive on the shores of what was to become the Gold Coast. Their initial interest was in trading for gold, ivory and pepper.<sup>16</sup>

In 1482, the Portuguese built a permanent trading post, the Elmina Castle, along the west coast of present-day Ghana. The castle later served as a base for their slave trading activities. Other Europeans including the Dutch and the English also built castles and forts to enhance their slave trading activities and perpetuate their influence around the vicinity of the castles and forts.<sup>17</sup> By the middle of the nineteenth century, the British had expanded their influence and rule among the coastal people.<sup>18</sup> The Gold Coast colony at the time consisted of the castles, forts and settlements along the coast. In 1900 the British defeated the Asantes, annexed the region and extended their protectorate to the north of the country to prevent French expansion in the area.<sup>19</sup>

Meanwhile, it was the British African Company of Merchants that was in control of the castles and forts, and imposed some administration on the people in the vicinity of the castles. However to stop the slave trade and maintain security in the coastal areas, the

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The seventeenth and eighteenth centuries saw a struggle among the English, Dutch Danes and the Swedish for fortified positions along the coastal areas of Ghana. In 1642, after the Portuguese had lost the Elmina Castle to the Dutch, they left the Gold Coast. The Danes also left in 1850. The British gained possession of all Dutch coastal forts by the last quarter of the nineteenth century, thus making them the dominant European power on the Gold Coast.

<sup>19</sup> *Id.* at 17.



British Crown dissolved the company in 1821 and gave authority over the British forts on the Gold Coast to the British governor of Sierra Leone, Governor Charles McCarthy.<sup>20</sup>

After the death of the governor, during one of the Anglo-Asante wars, a London committee of merchants chose Captain George Maclean to administer the forts and the surrounding settlements. As an assessor, he held regular courts with the local chiefs to try offenders by applying the English common law and principles of equity. The assessor also made use of the local customary law.<sup>21</sup>

Maclean's exercise of limited judicial power around the forts was so effective that a parliamentary committee recommended that the British government permanently administer its settlements and negotiate treaties with the coastal chiefs that would define British relations with them. These reasons coupled with the need to assimilate the customary law into the general principles of British law led to the signing of the Bond of 1844 between the British and the local Fante chiefs.<sup>22</sup> Appeals from this first court went to the Governor, sitting with the chiefs and the judicial assessor.<sup>23</sup>

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<sup>20</sup> *Id.* at 264.

<sup>21</sup> P.K.TWUMASI, CRIMINAL LAW IN GHANA 21-22 (2d ed. 1996) [hereinafter TWUMASI CRIMINAL LAW]. The local chiefs and their elders had their own traditional courts where offenders against customary practices were tried. The chiefs were not prepared to relinquish their judicial authority which was indicative of their chiefly status. Offenses they tried included: (1) Putting a person into fetish; (2) Swearing an oath contrary to custom; (3) Insulting a chief; and (4) Breach of allegiance by a sub-chief to the head chief.

<sup>22</sup> *Id.* Paragraph 3 of the Bond states: "Murders, robberies, and other crimes and offences will be tried and enquired of before the Queen's judicial officers and the chiefs of the districts, moulding the customs of the country to the general principles of British law." *Id.*

<sup>23</sup> *Id.*

In the meantime, the first governor of the Gold Coast, Commander Worsley Hill, had been appointed. Later certain coastal states as well as other states inland signed the Bond to come under British protection. In 1852, local chiefs and elders met the governor to discuss means of raising revenue. With the governor's approval the council of chiefs constituted itself as a legislative assembly.<sup>24</sup> However, the assembly was "given no special constitutional authority to pass laws or to levy taxes without the consent of the people."<sup>25</sup>

A landmark in the development of the judiciary in Ghana was the enactment of the Supreme Court Ordinance in 1876. This law, which was promulgated by the Governor of the Gold Coast Colony, with the advice and consent of the Legislative Council, was "for the constitution of a Supreme Court and for other purposes relating to administration of justice."<sup>26</sup> In addition the Native Jurisdiction Ordinance of 1883 empowered certain chiefs to make bylaws, violation of which they could try as criminal offenses.<sup>27</sup> Appeals from the Native Courts went to the magistrate courts and further to the divisional courts.

Earlier, the British Secretary of State for the Colonies had asked the Governor "to revise the existing laws of the settlements with a view to frame one simple body

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<sup>24</sup> See DA PAM. 550-153, *supra* note 4, at 15.

<sup>25</sup> *Id.*

<sup>26</sup> A.N.E. Amissah, *The Supreme Court, A Hundred Years Ago*, in ESSAYS IN GHANAIAN LAW 1-3 (Daniels & Woodman eds, 1976).

of laws for the whole Colony.”<sup>28</sup> In particular, the Governor was to prepare laws affecting the administration of justice.<sup>29</sup> From the day the Supreme Court was established the position of the judges remained substantially unchanged until 1954. The judiciary was treated as part of the ordinary Public Service. An observation by a justice of the court of appeal sums up this perception:

The judicial tradition bequeathed by the British colonial administration to the African states was not as would encourage the kind of judicial independence of action of the other branches of government as is associated with the American courts. The position of the courts was that of an adjunct of the executive. There was hardly any question of their holding the ring between the executive, the legislature and the people...<sup>30</sup>

In 1955, regular courts were established throughout the country under the Courts Ordinance. These courts had jurisdiction in civil and criminal matters. The Supreme Court, with the Chief Justice as the president of the court, operated through a number of divisional courts in various parts of the country. Under the Supreme Court were a number of courts of summary jurisdiction presided over by magistrates. Further, the West African Courts of Appeal Ordinance, as revised, provided persons not satisfied with a Supreme Court decision to appeal to the West African Court of Appeal.<sup>31</sup> Lastly, one could appeal to the Judicial Committee of the Privy Council in London.<sup>32</sup>

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<sup>27</sup> See TWUMASI CRIMINAL LAW, *supra* note, 21, at 22.

<sup>28</sup> See A.N.E. Amissah, *supra* note 26.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See TWUMASI CRIMINAL LAW, *supra* note 21, at 25. The West African Court of Appeal Ordinance (Chapter 5) of 1951 created a Supreme Court consisting of the Chief Justices of Ghana, Nigeria, Sierra

Before independence the judicial structure in Ghana consisted of:

- (1) Judicial Committee of the Privy Council (that exercised final judicial authority);
- (2) West African Court of Appeal;
- (3) The Supreme Court (Gold Coast) consisting of divisional courts;
- (4) Magistrate courts; and
- (5) Native or local courts (exercised jurisdiction mainly in customary matters).

#### B. The Judiciary After Independence

Ghana gained her independence on March 6, 1957. The first laws that the new nation enacted included an amendment to the Courts Ordinance of 1951.<sup>33</sup> The law recreated the Court system of Ghana consisting of the Court of Appeal and the High Court. The Court of Appeal referred to the West African Court of Appeal; and the High Court, made up of judicial divisions, sat in the different regions of the country to hear cases. The divisional courts of the High Court did not only hold criminal sessions but also heard

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Leone and a judge of the Supreme Court of the Gambia. This became the appellate court of all the British colonies in West Africa.

<sup>32</sup> *Id.* (citing West African Court of Appeal (Appeal to the Privy Council) Order in Council (1948)).

<sup>33</sup> *Id.* (citing The Courts (Amendment) Ordinance, § 2, (1957) (establishing the superior courts of Ghana)).

appeals from the magistrate courts within their respective jurisdictions.<sup>34</sup> It is interesting to note that appeals from the superior courts could still go to the Privy Council.

On July 1, 1960 the judicial link with Britain was severed when Ghana achieved a republican status. Shortly afterwards, the Courts Act of 1960 was enacted. It provided for the jurisdiction, composition and procedure of the following courts in Ghana:

- (1) The Supreme Court;
- (2) The High Court;
- (3) Circuit Courts;
- (4) District and Juvenile Courts; [and]
- (5) Local Courts.<sup>35</sup>

A new development in the judicial system was the creation of the Circuit Courts that came to fill the gap between the High Court and the district or magistrate courts. They were given powers to try certain criminal cases by jury or by assessors in much the same way as the High Court could do.<sup>36</sup> The Act did not provide for a court of appeal

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<sup>34</sup> *Id.* There were three enactments in respect of the jurisdictions of the courts: 1. The Court of Appeal Ordinance of 1957 provided for "the appellate jurisdiction of and procedure in the Court of Appeal in both civil and criminal matters from any divisional court of the High Court." 2. The Commissioners of Assize and Civil Pleas Act, 1958, empowered the Governor-General "to appoint from time to time for a two-year period, fit and qualified persons to exercise judicial functions in any divisional court of the High Court...." They also had "jurisdiction in both civil and criminal matters. Their criminal jurisdiction required them: (a) to try any criminal case where the maximum penalty on conviction was death or life imprisonment, [and] (b) to hear any appeal from Magistrates' Courts in any criminal case or matter." 3. The District Magistrate (Extended Jurisdiction) Act of 1959 gave powers to the district magistrates to exercise the jurisdiction of the High Court to hear and determine certain criminal offenses. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

and the Supreme Court became the highest court in Ghana. No appeal could be sent to the Privy Council.

Above-mentioned courts were the normal courts of judicature. In 1961, the Criminal Procedure Code was amended to give powers to the President to take certain crimes out of the jurisdiction of the magistrate and High Courts to a special criminal division of the High Court.<sup>37</sup> One could say that the only justification for the creation of this Special Court was to enable the President to deal with "political" cases. Attempts were made to assassinate him, and the Special Court was designed to deal with certain specific offenses.<sup>38</sup> The Supreme Court had no jurisdiction to entertain appeals from the Special Court.

The 24<sup>th</sup> day of February 1966 saw the first military take-over of the reigns of government in Ghana. The new government, under the name, National Liberation Council, passed the Courts Decree, 1966.<sup>39</sup> The decree repealed the Courts Act of 1960, and abolished the Special Court. The courts created under section 1 of the decree were:

(a) The Court of Appeal;

(b) The High Court;

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<sup>37</sup> Criminal Procedure (Amendment) Act, (Act 91) (1961).

<sup>38</sup> See TWUMASI CRIMINAL LAW, *supra* note, 21 at 412. In August 1963, the Special Court "sat for the first time to try seven persons for various offenses including, treason and possession of arms without lawful authority." The second treason trial involved five persons including, two government Ministers who were charged with attempting to overthrow the Government of Ghana by unlawful means. *Id.*

<sup>39</sup> *Id.* at 21 (citing the National Liberation Council (NLC) Decree 84) (restoring the provisions of the Courts (Amendment) Ordinance (1957.))

(c) The following inferior Courts:

- (i) The Circuit Courts;
- (ii) District Courts of two grades designated District Courts (Grade I) and District Courts (Grade II); and
- (iii) Such other Inferior Courts as may be provided by law.<sup>40</sup>

The Supreme Court was replaced with the Court of Appeal which became the highest court in Ghana. The decree also made provision for the establishment of juvenile courts to deal with juvenile offenders (that is persons under the age of seventeen years). In 1969, the civilian government that was elected into power, after the three-year military regime of the National Liberation Council, effected changes in the judicial structure. The Courts Act, 1971, (Act 372) established the following courts:

- 1. The Supreme Court of Ghana;
- 2. The Court of Appeal;
- 3. The High Court;
- 4. The Circuit Courts;
- 5. District Courts (Grade I and II);
- 6. Juvenile Courts; and
- 7. Traditional Courts: National House of Chiefs; Regional House of Chiefs and Traditional Councils.<sup>41</sup>

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<sup>40</sup> *Id.* NLC Decree 84 provided for the establishment of juvenile courts which were of summary jurisdiction. These courts were presided over by district magistrates of the districts within which the juvenile courts were located, as chairman, sitting with not less than two members of the juvenile court magistrates.

<sup>41</sup> Ghana is divided into ten regions, and each region has a regional House of Chiefs composed of district traditional councils. The National House of Chiefs has appellate jurisdiction over chieftaincy matters.

The Supreme Court once again became the highest court in Ghana. All the courts, with exception to the traditional courts, had powers to try criminal cases. However, the jurisdiction of the traditional courts was limited to adjudicating over any cause or matter affecting chieftaincy within their respective areas of responsibility.

It has been stated that post-colonial Ghana “inherited state machinery that had evolved under British rule and that emphasized strong centralization of power and top-down decision making.”<sup>42</sup> When Rawlings came to power in 1981, he advocated participatory democracy and accountability. In 1984, the military government established “Committees for the Defense of the Revolution (CDRs)” in the communities and work places.<sup>43</sup> The principal functions of the committees “were to ensure democratic participation in decision-making in all communities and work places; to guard against corruption ... and social injustice.”<sup>44</sup>

People were encouraged to send any disputes they might have to the committees for solution. Gradually, the committees arrogated to themselves certain judicial functions, including settling family and tenancy disputes. These committees provided the thrust for the introduction of the tribunal system in Ghana. The tribunal system has been retained in

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<sup>42</sup> See DA PAM. 550-153, *supra* note 4, at 194. The first President, for example, created one-party regime. Authoritarian and arbitrary nature of the leaders limited general democratic participation and public debate on governmental policies.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



the Constitution, and therefore it may be desirable, at this juncture, to discuss the constitutional provisions with regard to the Judiciary in Ghana.

The Constitution of Ghana was approved in a national referendum in April 1992. Chapter eleven of the Constitution, dealing with the Judiciary, echoes, in a way, the participatory policy of the Rawlings administration. For instance, article 125, states, among other things:

(1) Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary that shall be independent and subject only to this Constitution.

(2) Citizens may exercise popular participation in the administration of justice through the institutions of public and customary tribunals and the jury and assessor systems.<sup>45</sup>

The Judiciary is to consist of:

(a) The Superior Courts of Judicature comprised:

(i) The Supreme Court;

(ii) The Court of Appeal; and

(iii) The High Court and Regional Tribunals.

(b) Such lower courts or tribunals as Parliament may by law establish.<sup>46</sup>

The Supreme Court consists of the Chief Justice and not less than nine other Justices of the Supreme Court.<sup>47</sup> The Court of Appeal is constituted by three Justices.<sup>48</sup>

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<sup>45</sup> See GHANA CONST. *supra* note 6, art 125.

<sup>46</sup> *Id.* art. 126 (1) (b).

<sup>47</sup> *Id.* art. 128 (1).

The High Court on the other hand, may be constituted by (i) a single Justice; or (ii) a single Justice and a jury; or (iii) a single Justice with assessors; or (iv) three Justices of the Court for the trial of the offense of high treason or treason.<sup>49</sup>

The Constitution further provides for the establishment in each region of Ghana “such Regional Tribunals as the Chief Justice may determine.”<sup>50</sup> A Regional Tribunal will be “constituted by a panel consisting of the Chairman and not less than two other panel members.”<sup>51</sup> The Chairman of a Regional Tribunal will have the same qualification as that of a Justice of the High Court.

In 1993, Parliament enacted the Courts Act, (Act 459), creating the following inferior or lower courts:

- (a) Circuit Court and Circuit Tribunal;
- (b) Community Tribunal;
- (c) The National House of Chiefs, Regional Houses of Chiefs and Traditional Councils.<sup>52</sup>

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<sup>48</sup> *Id* art 136 (2).

<sup>49</sup> *Id.* art.139 (2).

<sup>50</sup> *Id.* art. 142 (1).

<sup>51</sup> *Id.* art. 142 (3).

<sup>52</sup> Courts Act, 1993 (Act 459), § 39.

Whereas the ordinary Circuit Court has jurisdiction over both civil and criminal matters, the Circuit Tribunal has powers to deal with only criminal cases. The traditional chiefs who have been the repository of the customary law were given special recognition under the Constitution.<sup>53</sup> It must be emphasized that at the inception of colonial rule in Ghana, the colonial authorities recognized the customary law that had evolved with the people over the ages. This gave impetus to the "indirect rule" policy of the British, by which the government used the local chiefs to administer the governed.

To sum up this part of the discussion, the judicial system in Ghana has its roots in the English common law and the doctrines of equity that assimilated the local customary law of the people. Military interventions have also added the tribunal system to the orthodox structures of the judiciary. The jurisdiction of the Supreme Court and the Court of Appeal in criminal cases is mainly appellate in nature; that of the High Court, a mixture of both original and appellate; that of the Regional Tribunal, a mixture of original and appellate; and all the inferior courts have only original jurisdiction. This development of the civilian justice system had significant impact on the development of the military justice system in Ghana.

### C. History of the Military Justice System in Ghana

#### 1. *The Military Under the Colonial Administration*

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<sup>53</sup> GHANA CONST. art. 272. This article empowered the National House of Chiefs to (a) "advise any person or authority charged with any responsibility under this Constitution or any other law for any matter relating to or affecting chieftaincy; and (b) undertake the progressive study interpretation and codification of

By the beginning of the seventeenth century, most ethnic groups constituting modern Ghanaian society had entrenched themselves in their present locations. Each group had its own "*asafo*" company (local army) to secure its interest. Among the well-developed armies was that of the Asante, who launched military expeditions against the coastal people, especially the Fantes. To stop Asante incursions, the British mobilized the coastal people into the nucleus of the present Ghana Armed Forces.<sup>54</sup>

After the annexation of the Asante Empire as a British protectorate in 1900, the colonial administration "established the Gold Coast Regiment as a component of the West African Frontier Force (WAFF).<sup>55</sup> British officers and non-commissioned officers organized and trained the Gold Coast Regiment which served in the WAFF during World War I. Again in the Second World War, about 65,000 Ghanaian troops served in the Royal West African Frontier Force (formerly WAFF).

In 1939, the British passed the Local Forces Regulations that provided for the convening of Courts of Inquiry.<sup>56</sup> Under the King's Regulations, a Court of Inquiry was required to collect and record evidence, and report on any matter referred to the court.

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customary law...." Customary law is defined under art.11 (3) as "the rules of law which by custom which by custom are applicable to particular communities in Ghana." *Id.*

<sup>54</sup> DA PAM. 550-153 *supra* note 3 at 6-7, 267.

<sup>55</sup>*Id.* at 266.

<sup>56</sup> Local Forces Regulation (Chapter 55) 1939, section 22 states: "(1) The Commandant, the Commanding Officer of the Territorial Battalion, the Commanding Officer of the Gold Coast Field Ambulance...are authorized to convene Courts of Inquiry in accordance with the provisions of the King's Regulations for the Army and the Army Reserve governing Courts of Inquiry as from time to time amended."

Further the British Manual of Military Law provided for the trial of offenders. For example, a person could be tried by either a district court-martial, a general court-martial, and, in certain circumstances, a field general court-martial. Earlier on, the Gold Coast Naval Volunteer Force had been established. The enabling enactment provided the regulations for the maintenance of discipline:

All the enactments and regulations for the time being in force for the enforcement of discipline in the Royal Navy shall apply...to officers and men of the Force during such period as they are under instruction, training or exercise or in actual service whether ashore or afloat or within or without the limits of the Gold Coast Colony.<sup>57</sup>

It may be noted that until Ghana achieved republican status in 1960, the British Army Act of 1955 provided the rules for disciplinary action. Reference can still be made to the Army Act with regard to court-martial procedures: "The "Rules of Procedure (Army) 1956" of the British Army Act, 1955 shall apply to the Armed Forces Regulations, unless the provisions of these Rules or any part thereof are included in or are inconsistent with the provisions of these Regulations."<sup>58</sup>

The British Manual of Military Law (MML) observes in its introduction, the following: "A man who joins the army, whether as an officer or as a soldier, does not cease to be a citizen."<sup>59</sup> In fact, an officer or a soldier remained subject to the ordinary

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<sup>57</sup> Gold Coast Naval Volunteer and Defense Ordinance (1938), ch. 60, sec. 5.

<sup>58</sup> See AFR vol. II, *supra* note 9, art. 112.04.

<sup>59</sup> MANUAL OF MILITARY LAW PART 1 (1972) [hereinafter MML] The MML further states: "In respect of civil rights, duties and liabilities the ordinary law in general also applies to him, although a few privileges are granted to him and certain restrictions are imposed upon him for the purpose of enabling the better to fulfill his military duties." *Id.*

law and also subject to the military law. A service member who committed a service offense was dealt with under the military law. The commanding officer (CO) had a responsibility to investigate any charge against a service member. After investigation, and depending on the rank of the accused, he could take one of the following actions:

- (1) Where the accused is an officer of the rank of lieutenant colonel and above, the commanding officer must either dismiss the charge or take action to send the case for trial by a court-martial.
- (2) Where the accused is below the rank of lieutenant colonel, or he is a warrant officer, the commanding officer must either dismiss the charge or send it to higher authority for disposal.
- (3) Where the accused is a non-commissioned officer or a soldier the commanding officer may deal with it summarily or take action to send it for a court-martial.<sup>60</sup>

The commanding officer or the higher authority could seek legal advice on the action to take. Where a case was not dealt with summarily, the commanding officer or a delegated officer had to take a summary of evidence or an abstract of evidence. The summary would be taken in the presence of the accused who would be allowed to cross-examine the prosecution witnesses. Additionally, the accused was permitted to give evidence and also call witnesses in his defense.<sup>61</sup> However, neither the accused nor his witnesses could be cross-examined.<sup>62</sup> Significantly, the accused was not represented by counsel.

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<sup>60</sup> Army Act, 1955 [hereinafter A.A.1955] § 77.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

The purpose of the summary of evidence, (similar to Article 32 Investigation under the United States Uniform Code of Military Justice) is to assemble the facts necessary to prove the charge against the accused.<sup>63</sup> The summary of evidence and the Article 32 Investigation have certain characteristics in common. They differ, however, in certain important respects. For example, under article 32 of the UCMJ defense counsel can cross-examine the prosecution witnesses. Under the Army Act there was no such right for defense counsel.

After legal advice had been given on the summary of evidence to the effect that a prima facie case could be made against the accused, the convening authority would convene an appropriate court-martial by means of a convening order. Under the Army Act, there were two types of court-martial: general court-martial (GCM) and district court-martial (DCM).<sup>64</sup> It is, however, important to note that "Where the officer commanding a body of the regular forces on active service...is of the opinion that it is not possible without serious detriment to the public service that the charge should be tried by a general court-martial or district court-martial, the officer may...direct that the charge shall be tried by a field general court-martial (FGCM)." <sup>65</sup>

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<sup>63</sup> U.C.M.J. art. 32.

<sup>64</sup> A.A. 1955, *supra* note, 59, § 84 (1).

<sup>65</sup> *Id.* § 85 (1) The field court-martial would normally be held in an area of operation. Its composition and punishment were different from those of ordinary general court-martial.

With regard to jurisdiction, a general court-martial had power to try any service member for any service offense, and to award any punishment authorized by the law.<sup>66</sup> On the other hand, a disciplinary court-martial had the same powers of a general court-martial except that it would not try an officer or sentence a warrant officer to imprisonment, dismissal with disgrace, dismissal or detention, and would not award the punishment of death or of imprisonment for a term exceeding two years.<sup>67</sup> Furthermore, a field general court-martial could exercise the powers of a general court-martial except that where the court consisted of less than three officers the sentence would not exceed imprisonment for a term of two years.<sup>68</sup>

The general court-martial consisted “of the president and not less than four other officers.”<sup>69</sup> A district court-martial consisted of the president and not less than two other officers.<sup>70</sup> Finally, the field general court-martial consisted of: “the president and not less than two other officers, or if the convening officer is of the opinion that three officers having suitable qualification are not available without serious detriment to the public service, shall consist of the president and one other officer.”<sup>71</sup>

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<sup>66</sup> *Id.* § 85 (1)

<sup>67</sup> *Id.* § 85 (2).

<sup>68</sup> *Id.* § 85 (3).

<sup>69</sup> *Id.* § 87 (1). Notes to this section indicate that members should normally be army officers. However, where “naval or air force officers are attached, such officers can be appointed as members.” *Id.*

<sup>70</sup> *Id.* § 88 (1).

<sup>71</sup> *Id.* § 89 (1).



A convening authority was not normally a member of the court-martial he convened. However, in the case of a field general court-martial if "it is not practicable in the opinion of the convening officer to appoint another officer as president, he may himself be president of the court-martial."<sup>72</sup> In addition, it was mandatory to appoint a judge advocate for a GCM, but optional for a DCM or a FGCM.<sup>73</sup>

Officers mentioned above were to belong to "Her Majesty's military forces" and be subject to military law. The term "Her Majesty's military forces" was construed to include "colonial forces". It is observed that a field general court-martial was convened in exceptional circumstances. The public interest was used as a factor in determining the requisite number of members. Arguably, an accused might not have all the "benefits" that a normal GCM afforded.

For instance, it might be difficult to accept a situation where the convening officer became the president of the FGCM, and maintain that there was little or no element of unfairness including undue command influence. Further, under section 107 of the Army Act, where an accused was found guilty, the record of proceedings of the court-martial was sent to a confirming officer (who was normally named in the convening order) for his action. In the circumstances of a FGCM, it was not inconceivable for the convening officer to act as a confirming officer.

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<sup>72</sup> *Id.* § 90 (1).

<sup>73</sup> RULES OF PROCEDURE § 22 (1969) [hereinafter R.P.].

From the discussion above, one could say that on the eve of Ghana's independence, the army was well organized. The army commander and most senior officers were, however, British. There were laws to regulate the conduct of service members, and service tribunals to deal with various offenses. In short, the military justice system was well established.

## 2. *The Military After Independence*

After independence in 1957, Ghana elected out of the Royal West African Frontier Force; and the government established the navy and air force as separate services.<sup>74</sup> On attaining a republican status in 1960, the government embarked on "Africanization" of the armed forces by asking all British military personnel to leave. The mission of the armed forces was re-defined. It is no longer to support the colonial authority. Instead the mission has been twofold: "to protect Ghana's territorial integrity from foreign aggression, and to maintain internal security."<sup>75</sup>

Paradoxically, the military has been used to overthrow constitutional administrations. Of all the military interventions, none has had a greater impact on the military justice system than the regime of the Provisional National Defense Council that assumed power in December 1981. The government's concept of participatory

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<sup>74</sup> DA PAM. 550-153, *supra* note 3, at 268. See also Act 105, *supra* note 7, § 1 which states: "There shall be raised and maintained in accordance with the provisions of this Act and of regulations made there under, an army, navy, and air force, to be known as the Army of Ghana, Navy of Ghana, and Air Force of Ghana, not exceeding such strength as may from time to time be determined by Parliament." *Id.*

<sup>75</sup> *Id.* 277.

democracy was introduced into the military. Committees for the Defense of the Revolution were formed in various installations. Meanwhile, the military justice system was largely based on the Armed Forces Act, 1962, (Act 105) together with its regulations.

On 31 December 1981, the government of the Provisional National Defense Council (PNDC) took over power.<sup>76</sup> On 11 January 1982, the establishment proclamation created Public Tribunals.<sup>77</sup> Then on 21 July 1982, the Special Military Tribunal (Amendment) Law was passed to deal with certain specific offenses.<sup>78</sup> The special military tribunals were to run parallel to the traditional military tribunals or courts-martial. A special military tribunal was composed: “ (a) in the case of a panel of seven members, of not more than four officers or more than five enlisted men; and (b) in the case of a panel of five members, of not more than three officers or more than three enlisted men.”<sup>79</sup>

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<sup>76</sup> DA PAM. 550-153, *supra* note 4.

<sup>77</sup> See P.N.D.C. Proclamation, *supra* note 5.

<sup>78</sup> Provisional National Defense Council Law 19 (1982) [hereinafter P.N.D.C.L.19]. Section 4 (2) of the law states: “A special military tribunal shall...have all the powers of a high court of justice.” Section 5 also states:

The Armed Forces Act (Act 105) shall, with such modification as may be necessary to give effect to the provisions of the law and such other modifications as the Provisional National Defense Council may direct, apply in respect of the arrest, trial and punishment of any person (whether civilian or not) for an offense under this law as if that offense were a service offense and as if a special military tribunal appointed under this law were a service tribunal, and also as if any person alleged to have committed an offense under this law were a person subject to the code of service discipline.

*Id.*

<sup>79</sup> *Id.*

Offenses created under the law included: preparing to overthrow the government; a service member who assaults or molests any person or uses his position for unauthorized purpose or act. Punishments the special military tribunals could award range from death penalty to dismissal with disgrace from the armed forces and reduction in rank. Furthermore, a special military tribunal adopted the procedure of summary trials, and a decision of the tribunal was final and no appeal could lie from such a decision.<sup>80</sup> The Commander-in -Chief of the Ghana Armed Forces or any person authorized by him could convene the special military tribunal.

In 1984, the jurisdiction of the special military tribunal with respect to persons it could try was widened to cover retirees and deserters from the armed forces. The law was also amended to make it possible to try offenders in absentia.<sup>81</sup> The composition of the tribunal was also modified:

- (a) In the case of a panel of seven members, (to) consist of not more than four officers or more than five other ranks (enlisted men);
- (b) In the case of five members, (to) consist of not more than three officers or not more than three other ranks; (and)
- (c) In the case of a panel of three members, (to) consist of the Unit Commander (commanding officer), one officer and one other rank.<sup>82</sup>

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<sup>80</sup> *Id*

<sup>81</sup> Provisional National Defense Council Law 77, § 2(2)(c) (1984).

<sup>82</sup> Provisional National Defense Council Law 100, § 3(4) (1984).

The special military tribunal was similar to the civilian public tribunal. These were supposed to be temporary courts to solve pressing issues in the wake of the military take-over. The composition of the courts was based on the participatory concept of the government. The concept found its way into the military justice system, leading to the establishment of disciplinary boards to try service member. Details of this development will be discussed below.

The military justice system of Ghana is based on the Armed Forces Act, (1962), Act 105. It is the statutory authority for regulating and administering the military. The Act is divided into three broad parts: (1) The first part deals with the organization of the armed forces; (2) The second part focuses on the persons subject to the Code of Service Discipline, and various service offenses and punishments; and (3) The third segment deals with various service tribunals and their jurisdictions. There are also regulations, made under the Act, that detail the trial procedures, and summarize the rules of evidence.<sup>83</sup>

The Armed Forces Act has its authority in the Constitution of Ghana. The Constitution created the armed forces: “There shall be the Armed Forces of Ghana which shall consist of the Army, the Navy and the Air Force and such other services for which provision is made by Parliament.”<sup>84</sup> The Constitution has also provided for establishment of military tribunals: “Parliament may, by or under an Act of Parliament,

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<sup>83</sup> See AFR vol. II, *supra* note 9.

<sup>84</sup> See GHANA CONST. art. 210(1).

establish military courts or tribunals for the trial of offenses against military law committed by persons subject to military law.”<sup>85</sup>

Additionally, the Constitution has created the Armed Forces Council that may, with the prior approval of the President “make regulations for the performance of its functions under this Constitution or any other law, and for effective and efficient administration of the Armed Forces.”<sup>86</sup> Under the armed forces regulations, it is the responsibility of officers to “promote the welfare, efficiency, good order and discipline of all who are subordinate to him.”<sup>87</sup>

Article 101.08 of the regulations also states:

When, in any proceedings under the Code of Service Discipline, a situation arises that is not provided for in the Armed Forces Regulations (AFR) or in orders or instructions issued to the Armed Forces by the Chief of the Defense Staff, the course that seems best calculated to do justice shall be followed.<sup>88</sup>

Both discipline and justice are given equal consideration under the military justice system in Ghana. Indeed to safeguard discipline, fairness must characterize actions of

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<sup>85</sup> *Id.* art. 19(20) also states:

Where a person subject to military law, who is not in active service commits an offence which is within the jurisdiction of a civil court, he shall not be tried by a court-martial or a military tribunal for the offence unless the offence is within the jurisdiction of a court-martial or other military tribunal under any law for the enforcement of military discipline.

*Id.*

<sup>86</sup> *Id.* art. 214 (2).

<sup>87</sup> Ghana Armed Forces Regulations, vol. I, art 4.02 (c).

<sup>88</sup> See AFR vol. II, *supra* note 9, art. 101.08.

commanders. This concept of discipline and justice complementing each other was ably put by the American Powell Committee Report:

Discipline – a state of mind which leads to willingness to obey an order no matter how unpleasant or dangerous the task to be performed – is not a characteristic of a civilian community. Development of this state of mind is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus it is a mistake to talk of balancing discipline and justice – the two are inseparable.

....

It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.<sup>89</sup>

The constitutional provision under which courts-martial are created also provides for fair trial.<sup>90</sup> For instance, article 19 (1) states: “ A person charged with a criminal offense shall be given a fair hearing within a reasonable time by a court.” Further, the accused shall be (1) informed immediately in a language he understands, and in detail, of the nature of the offenses charged; (2) given adequate time and facilities for the preparation of his defense; (3) permitted to defend himself before the court in person or by a lawyer of his choice; and (4) afforded facilities to examine, in person or by his lawyer, witnesses called by the prosecution before the court ...<sup>91</sup>

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<sup>89</sup> THE POWELL COMMITTEE REPORT TO THE SECRETARY OF THE ARMY ON THE STATUS OF THE UCMJ (1960).

<sup>90</sup> GHANA CONST. ART. 119(1).

<sup>91</sup> *Id.*

These constitutional guarantees are to ensure fairness to the accused. At the same time good order and discipline must be maintained under the military justice system. For example, one of the provisions of the Armed Forces Regulations states in part: "The purpose of punishment is the maintenance of discipline. The proper punishment is the least that will maintain discipline."<sup>92</sup> There is no doubt that discipline is the hallmark of the military, and this is what distinguishes the military from the civilian society. Without discipline the military will degenerate into a mob.

It cannot be disputed that the military justice system has certain distinctive characteristics. The peculiar nature of the military justice system has been stated succinctly as follows:

The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence. Yet the dictates of individual liberty clearly require some check on military authority in the conduct of courts-martial. The provisions of the Uniform Code of Military Justice with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice, on one hand with the demands for an efficient, well-disciplined military, on the other.<sup>93</sup>

It is observed, from the discussion above, that discipline and justice are not mutually exclusive in the military justice system of Ghana. This notion was given meaning and support *in re Signalman Tetteh Samuel v. The Republic*, when the Court-Martial Appeal Court held:

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<sup>92</sup> AFR vol. II, *supra* note 9, art.108.33.

<sup>93</sup> *Curry v. Secretary of the Army*, 595 F.2d 873, 877 (D.C. Cir. (1979)).



[T]hat to strike a superior officer (in this instant a Colonel ) in the armed forces or to refuse to obey a superior officer is one of the most serious offenses in the armed forces. Not only would such an offense undermine discipline in the armed forces, it would completely destroy the structures of the armed forces. The Court will not interfere with the discipline of the armed forces.<sup>94</sup>

Under Ghana's military justice system the Armed Forces Act provides the substantive law, while the Armed Forces Regulations detail the procedures that are used at the service tribunals. The Armed Forces Act has created four service tribunals with original jurisdiction. The different service tribunals try various categories of service members for service offenses.

Before any trial, there are pre-trial issues to contend with. First, there will be investigation into the allegations made against the service member. It must be noted at this juncture that to appreciate the military justice system one has to examine, among other things, the functions of the Office of the Judge Advocate General and the Directorate of Legal Services. They play important roles in the administration of the military justice system.

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<sup>94</sup> 4 C.M.A.98 (1999). This was a case where the enlisted service member was convicted on two counts of using violence against the superior officer, and one count of conduct prejudicial to good order and discipline. He was awarded "dismissal from the armed forces. His ground of appeal was that the punishment was "harsh and excessive." *Id.*

3. *Office of the Judge Advocate General and the Directorate of Legal Services*

When the Armed Forces Act was enacted in 1962, no provision was made for the office of the Judge Advocate General. The Act provided, inter alia, for the appointment of a judge advocate: "The Chief Justice shall appoint a person to officiate as judge advocate at a general court-martial."<sup>95</sup> In 1969, the law was amended by the insertion of the following section:

Notwithstanding anything in sections 68 and 73 of this Act, the Commander-in-Chief of the Armed Forces may, after consultation with the Chief Justice, appoint a person to be known as the Judge Advocate General of the Ghana Armed Forces to officiate generally at courts martial as a judge advocate and to perform such other functions as the Commander-in-Chief may from time to time assign to him.<sup>96</sup>

The Armed Forces Regulations spell out the general responsibilities of the judge advocate. These include:

(1) Where a judge advocate has been appointed to officiate at a court-martial, he may, in such circumstances and subject to such condition and procedures as are prescribed, determine questions of law arising before or after the commencement of the trial.

(2) Notwithstanding any article in this chapter, where a judge advocate has been appointed to act at a court-martial and any of the questions of law prescribed in (9) of this article arise, the president (of the court-martial) may direct that the issue be heard and determined by the judge advocate either in the presence or absence of the president and members of the court.

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<sup>95</sup> Act 105, *supra* note 7, § 68. The judge advocate is equivalent to the military judge under the Uniform Code of Military justice under the American military justice system.

<sup>96</sup> *Id.* § 73A.

(9) The following questions of law may be determined by the judge advocate under this article:

(a) Applications for adjournment on the ground that the particulars of the charge are inadequate or are not set out with sufficient clarity:

(b) Plea in bar of trial on the ground that the court has no jurisdiction:

(c) Applications by the accused to be tried separately in respect of any charge or charges: and

(d) All matters respecting the admissibility and exclusion of evidence.<sup>97</sup>

Furthermore, the Notes under the preceding Article indicate, among other things: “When the judge advocate, by virtue of his powers under this article had ruled an item of evidence as admissible, his ruling is on the question of admissibility only. The determination of the cogency, weight of probative value of such item of evidence is entirely and exclusively a matter for decision by the court.”<sup>98</sup> Additionally the judge advocate is responsible for “ the compilation and completion of the record of proceedings of the court and the custody of exhibits.”<sup>99</sup> The Directorate of Legal Services advises command on various legal matters in the armed forces, including pre-trial issues.<sup>100</sup> It is also responsible for all prosecutions before courts-martial.

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<sup>97</sup> AFR vol. II, *supra* note 9, art.112.15.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* art. 112.53.

<sup>100</sup> *Id.* art.109.07 (2) The article provides that where a commander, after investigation, considers that a charge should be proceeded with he will forward the summary of evidence together with all relevant documents to the Director Legal Services for pre-trial advice.

#### 4. *Pre-Trial Matters – Court-Martial*

##### *a. Investigation and Trial by Delegated Officer*

Every trial starts with an investigation. Before an allegation against a service member that “he has committed a service offense is proceeded with, (the) allegation shall be reported in the form of a charge to a Disciplinary Board to be appointed by the Commanding Officer.”<sup>101</sup> It is important to note that the disciplinary board has come to perform the role previously undertaken by the commanding officer alone. This was one of the changes brought about by the 1981 military take-over of reigns of government in Ghana.<sup>102</sup> If after investigation, the disciplinary board “is satisfied that the charge should not be proceeded with, it shall dismiss the charge; otherwise the charge shall be proceeded with under this Act as expeditiously as the circumstances may permit.”<sup>103</sup>

During the investigation, the alleged offender may be under arrest.<sup>104</sup> Further, he may be held in close custody if:

(a) The offense is of a serious nature; or

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<sup>101</sup> Act 105, *supra* note 7, § 62 (1).

<sup>102</sup> DA PAM. 550-153, *supra* note 4.

<sup>103</sup> *Id.* § 62(2).

<sup>104</sup> Act 105, *supra*, note 7, § 57 (1) states: “Every person who has committed, is found committing, is suspected of being about to commit, or is suspected of or charged under this Act with having committed a service offense, may be placed under arrest.”

(b) The offense is accompanied by drunkenness, violence or insubordination; or

(c) It is likely that he would otherwise continue the offense or commit another offense; or

(d) Close custody is considered necessary for his protection or safety.<sup>105</sup>

It is further provided that the disciplinary board must adhere to rules of evidence.<sup>106</sup> It is the responsibility of the disciplinary board presided over by a delegated officer, when investigating a charge, to decide whether to dismiss the charge (if there is no substance in the allegations), or dispose of the charge by the award of punishment within its powers.<sup>107</sup> The disciplinary board is composed of the delegated officer as chairman, one other officer, and three enlisted men.<sup>108</sup> To try the case the disciplinary board presided over by a delegated officer must consider the following four-prong test:

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<sup>105</sup> AFR vol. II, *supra* note 9, art.105.13.

<sup>106</sup> *Id.* app. I. The appendix gives a brief resume of the more important rules of evidence including: Rules as to relevancy, hearsay, opinion and confession.

<sup>107</sup> Act 105, *supra* note 7, § 63 (6). The section states:

Where the chairman of a disciplinary board is an officer other than a commanding officer such disciplinary board shall not impose punishment other than the following:

- (a) Detention not exceeding fourteen days;
- (b) Severe reprimand;
- (c) Reprimand;
- (d) A fine not exceeding basic pay for fourteen days; and
- (e) Such other minor punishments as may be prescribed. See also AFR vol. II Article 104.14 (2) which defines "minor punishment" to mean: confinement to barracks; extra work and drill; and caution.

*Id.* The minor punishments include: confinement to barracks for fourteen days, and extra work and drill.  
*Id.*

<sup>108</sup> *Id.* § 63 (1).

- (a) The accused is an enlisted man below the rank of warrant officer;
- (b) Having regard to the gravity of the offense, the disciplinary board considers that its powers of punishment are adequate;
- (c) The disciplinary board is not precluded from trying the accused person by reason of his election to be tried by court-martial; and
- (d) The offense is not one that under such regulations the disciplinary board is precluded from trying.<sup>109</sup>

In conducting the trial, the disciplinary board will inform the accused of the charge against him. The disciplinary board may direct that evidence be taken on oath or inform the accused that he has right to require that the evidence be taken on oath. Furthermore, members of the disciplinary board will receive such evidence as they consider necessary to assist them in determining whether: “ (1) the charge should be dismissed or the accused not found guilty; or (2) the accused should be found guilty; or (3) the accused should be remanded to the commanding officer.”<sup>110</sup>

Additionally, the board will hear the accused if he wishes to be heard. It can call “such witnesses as the accused may request to be called and whose attendance can, having regard to the exigencies of the services, reasonably be procured.”<sup>111</sup> The disciplinary board will also allow the accused to ask any such witnesses questions that are

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<sup>109</sup> *Id.* § 63 (2).

<sup>110</sup> AFR vol. II, *supra* note 9, art.108.13 (1) (a), (b), (c)

<sup>111</sup> *Id.* art. 108.13 (d), (e).

relevant to the charge or to the conduct and character of the accused. In the interest of justice the disciplinary board may adjourn proceedings as and when necessary.<sup>112</sup>

It is important to note that the accused conducts his defense. When the disciplinary board, after hearing the evidence, concludes that "it has been proved beyond reasonable doubt that the accused committed either: (a) the offense charged, on the particulars given in the charge report; or (b) the offense charged, on a special finding; or (c) a related or less serious offense prescribed in section 56 of the Armed Forces Act; the disciplinary board shall determine what sentence should be imposed."<sup>113</sup>

In determining the sentence, the disciplinary board will consider, among other things, the gravity of the offense; the character and previous conduct of the accused; and any consequences of the finding or of the sentence.<sup>114</sup> After all the evidence has been

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<sup>112</sup> *Id.* art.108.13 (f), (g).

<sup>113</sup> *Id.* art. 108.15. This Article provides:

When the disciplinary board concludes that: (a) while the facts proved differ materially from the facts alleged in the statement of particulars in the charge report, they are nevertheless sufficient to establish the commission of the offense stated in the charge report; and (b) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused in his defense, the board may, instead of making a finding of not guilty, make a special finding in which are stated the exceptions or variations from the facts alleged in the statement of particulars.

*Id.* See also Act 105, § 56, which provides, inter alia, for conviction for related or less serious offenses:

- (1) A person charged with desertion may be found guilty of attempting to desert or being absent without leave.
- (2) A person charged with attempting to desert may be found guilty of being absent without leave.
- (3) A person charged with any one of the offenses specified in section 24 of Act 105 (using threatening or insulting language, or behaving with contempt towards a superior officer), may be found guilty of any other offense specified in that section.

received, the disciplinary board “shall, if the accused is found guilty, in the presence of the accused, pronounce the sentence.”<sup>115</sup>

At the end of the trial the commanding officer will be informed of the outcome of the trial. This is necessary because the commanding officer is responsible for all punishments imposed at his station, unit or ship by a disciplinary board presided over by him or by a delegated officer.<sup>116</sup> In short, the commanding officer is obligated to ensure that “no unauthorized punishment is imposed; and that any punishment imposed is appropriate to the offense charged.”<sup>117</sup> Further, the commanding officer is empowered to quash or alter findings made or alter punishments imposed by a disciplinary board presided over by a delegated officer.<sup>118</sup> After the trial, a service member who is dissatisfied with the decision of a disciplinary board may submit a petition to the next higher authority for redress.<sup>119</sup>

It is important to note that copies of reports of trials are sent to the Director Legal Services for comment and where necessary. It is observed that the trial is non-adversarial and the punishment is non-judicial. However, the award of non-judicial punishment may

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*Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* art. 108.16.

<sup>116</sup> *Id.* art. 108.02.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* art. 114.55

<sup>119</sup> GHANA ARMED FORCES REG. vol. I (1969) [hereinafter AFR vol. I].



affect the service member's trade, grade, promotion or future military career. This award will also be used in any future court-martial in determining sentence.<sup>120</sup>

*b. Trial by Commanding Officer at Battalion Level*

The commanding officer may convene a disciplinary board presided over by himself to try offenders. Other members of the disciplinary board are: one other officer and three enlisted men.<sup>121</sup> The accused must be an enlisted man below the rank of warrant officer.<sup>122</sup> The disciplinary board must consider the gravity of the offense to determine whether its powers of punishment are adequate.<sup>123</sup> It will also consider whether the accused has elected to be tried by court-martial; and whether the disciplinary board is not precluded from trying the offense.<sup>124</sup>

When a disciplinary board chaired by the commanding officer is to try a service member, the commanding officer will detail an officer (assisting officer) to assist the accused " if (a) the accused requests that an assisting officer be detailed; and (b) the

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<sup>120</sup> AFR vol. II *supra* note 9, rt. 112.14 (2 ).

<sup>121</sup> Act 105, *supra* note 7, § 63.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* See also AFR vol. II, *supra* note 9, art.108.28 which lists offenses that a commanding officer may try. The offenses include: Disobedience of lawful command; Violence to a superior officer; Insubordinate behavior; Absence without leave; Abuse of inferiors; False statement in respect of leave; Drunkenness; and Unauthorized use of vehicles.

exigencies of the service permit compliance with his request.”<sup>125</sup> At the trial, the commanding officer must inform the accused that he has the right to be tried by court-martial. The accused will then be remanded for a period of not less than twenty-four hours to enable him to decide whether to elect to be tried by court-martial.<sup>126</sup>

When the accused indicates that he elects to be tried by court-martial, the commanding officer “ shall adjourn the case and as he sees fit direct that the accused be kept in custody or not pending further proceedings.”<sup>127</sup> However, if the accused agrees to be tried by the disciplinary board the disciplinary board will proceed with the trial.<sup>128</sup> The general rules for trial by a disciplinary board chaired by the commanding officer are similar to the procedures at trial by a disciplinary board presided over by a delegated officer.<sup>129</sup> Their powers of punishment, however, differ.<sup>130</sup> In determining sentence the disciplinary board must consider the following:

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<sup>125</sup> AFR vol. II, *supra* note 9, art. 108.26. The assisting officer attends when the commanding officer tries the accused. The assisting officer’s duty is to help the accused “ in the preparation of his defense, and advise him regarding witnesses and evidence.”

<sup>126</sup> *Id.* art. 108.31.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Act 105, *supra* note 7, § 63(3). The powers of a disciplinary board presided over by a commanding officer include:

- (a) Detention for a period not exceeding ninety days subject to approval by higher authority. (Detention not exceeding thirty days need no approval);
- (b) Reduction in rank subject to approval by an approving authority;
- (c) Severe reprimand;
- (d) Reprimand;
- (e) A fine not exceeding basic pay for one month;
- (f) Stoppages; and
- (g) Such minor punishments as may be prescribed.

- (a) Rank of the offender;
- (b) Length of service;
- (c) Character, background and service record, including previous convictions, if any;
- (d) Provocation, premeditation, or extenuating or aggravating circumstances;
- (e) Prevalence of the offense; and
- (f) Time spent in custody awaiting trial.<sup>131</sup>

Generally, unless the offense is of serious nature, “ the sentence for first offense should be light, or may be dispensed with entirely. Investigation requires deliberation, judgment and equanimity.”<sup>132</sup> If a sentence requires approval of higher authority, the commanding officer will prepare a punishment warrant, and forward it to the next superior officer to whom he is responsible in matters of discipline and who is an approving authority. In addition, the commanding officer will forward the conduct sheet of the accused.<sup>133</sup> Upon receipt of a punishment warrant, the approving authority will determine “whether the punishment proposed is appropriate to the offense.”<sup>134</sup>

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*Id. Contra supra* note 107.

<sup>131</sup> AFR vol. II, *supra* note 9, art.108.33 (2).

<sup>132</sup> *Id.* art. 108.33 (3).

<sup>133</sup> *Id.* art. 108.40.

<sup>134</sup> *Id.* art. 108.41.

In making this determination, the approving authority will consider “ the desirability of ensuring that, to the extent practical, uniformity of punishment is maintained.”<sup>135</sup> The approving authority may take any of the following actions: (a) approve the whole punishment; (b) reduce the term of the proposed punishment; or (c) substitute or vary the punishment.<sup>136</sup> The approving authority will then endorse on the punishment warrant his decision, and return the warrant to the commanding officer of the accused.<sup>137</sup> Finally, the commanding officer will inform the accused of the approving authority’s endorsement on the punishment warrant.<sup>138</sup> It must be emphasized that punishment warrants should be dealt with as expeditiously as possible. Failure to act with dispatch will be unfair to the accused.

*c. Taking of Summary or Abstract of Evidence*

A commanding officer is obligated to apply to higher authority for the disposal of a charge, unless the charge has been dismissed or unless a finding has been made at a summary trial.<sup>139</sup> To submit this application, the commanding officer or an officer detailed by him will prepare a summary or an abstract of evidence in accordance with the regulations.<sup>140</sup> The commanding officer is required not only to remand the alleged

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* art. 108.43 (1).

<sup>139</sup> *Id.* art. 109.01(1).

<sup>140</sup> *Id.* art. 109..01 (2).

offender but also to send notification of the said remand to his superior commander having authority to convene a court-martial.<sup>141</sup> A copy of the notification will be forwarded to the Director of Legal Services.

It is provided that a summary of evidence, as distinct from an abstract of evidence, will be taken if:

- (a) The maximum punishment for the offense with which the accused is charged is death; or
- (b) The accused, at any time before the charge against him is referred to higher authority, requires in writing that a summary of evidence be taken; or
- (c) The commanding officer is of the opinion that the interest of justice requires that a summary of evidence be taken.<sup>142</sup>

The summary of evidence must be taken in the presence of the accused by the commanding officer or an officer detailed by him.<sup>143</sup> Generally, prosecution witnesses will give their evidence orally and the accused will be given opportunity to cross-examine any prosecution witness.<sup>144</sup> After all the evidence against the accused has been given, the accused will be asked, in the presence of an independent witness, whether he wishes to give evidence or make a statement.<sup>145</sup> Any evidence given or statement made by the accused

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<sup>141</sup> *Id.* art. 109.01 (3).

<sup>142</sup> *Id.* art. 109.02 (1).

<sup>143</sup> *Id.* art. 109.02 (2).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* The question that is asked is as follows: "Do you wish to say anything? You are not obliged to do so, but, if you wish, you may give evidence on oath, or you may make a statement without being sworn. Any evidence you give or statement you make will be taken down in writing and may be given in evidence." *Id.*

will be recorded in writing.<sup>146</sup> The accused has right to call witnesses in his defense. It is important to note that the officer taking the summary is not required to cross-examine witnesses. He may, however, ask questions to clear any ambiguities.<sup>147</sup> It is worth-noting that the accused service member has no right to counsel.<sup>148</sup>

Sometimes instead of a summary of evidence, an abstract of evidence may be ordered. An abstract of evidence “ consists of signed statements by such witnesses as are necessary to prove the charge ...<sup>149</sup> The accused should not be present while the abstract of evidence is being taken. When an abstract of evidence has been made, a copy of it will be handed over to the accused and he will be cautioned in the following words:

This is a copy of the abstract of evidence in your case. You are not obliged to say anything with regard to it unless you wish to do so, but you should read it, and when you have read it, if you wish to say anything, what you say will be taken down in writing and may be given in evidence.<sup>150</sup>

When a summary or abstract of evidence has been completed, “ the commanding officer will cause a copy, together with a copy of the charge sheet, to be delivered to the accused.”<sup>151</sup> After at least twenty-four hours, the accused will be brought before the

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<sup>146</sup> *Id*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id* art. 109.03.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* art. 109.04.

commanding officer who will give him further opportunity to give evidence or make a statement and to call witnesses in his defense.<sup>152</sup>

When the accused is an officer below the rank of Lieutenant-Colonel or is a warrant officer, he will be asked whether if higher authority decides to try him summarily, he will have the summary or abstract of evidence read at the summary trial instead of witnesses being called to testify.<sup>153</sup> The answer of the accused will be endorsed on all the copies of summary or abstract of evidence forwarded to higher authority. The accused will also append his signature to the endorsement.<sup>154</sup>

After the summary or abstract of evidence has been read and considered by the commanding officer the following courses are open to him: (1) He may dismiss the charge; or (2) He may decide to deal with the case if it within his jurisdiction; or (3) In the case of a charge against an enlisted man, he may remand the accused for trial by court-martial; or (4) In the case of a charge against an officer or warrant officer, he will forward it to the higher authority who will determine the action to take.<sup>155</sup>

The application to higher authority will be accompanied by:

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* art. 109.05.

(a) A copy of the charge report on which the accused is held and a draft charge sheet containing the charges on which the commanding officer considers the accused should be tried by court-martial;

(b) Summary or abstract of evidence;

(c) Any documentary exhibits which are to be produced at the trial;

(1) Lists of witnesses for the prosecution and defense;

(2) Lists of exhibits;

(3) The conduct sheet, if any, of the accused;

(4) The statement, if any, of the accused;

(5) The record of service of the accused.<sup>156</sup>

The commanding officer will also include, where appropriate: "a statement that the accused elected trial by court-martial; a recommendation that the accused be tried by superior commander or by court-martial; and if no statement of the accused accompanies the application, confirmation that the accused was given opportunity to give evidence or make a statement but declined."<sup>157</sup>

When the superior commander considers that the charge should be proceeded with, he will forward the summary or abstract of evidence together with all the documents mentioned supra to the Director of Legal Services for pre-trial advice.<sup>158</sup> Subject to the pre-trial advice that may be given by the Director of Legal Services, the

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<sup>156</sup> *Id.* art. 109.06.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* art. 109.07.



superior commander will direct that the accused be tried by court-martial and take steps to have him so tried; or where he has jurisdiction, to proceed with a summary trial.<sup>159</sup>

*d. Summary Trial at Brigade Level*

At brigade level, an officer below the rank of Lieutenant Colonel or a warrant officer charged with a service offense may be tried by a disciplinary board "consisting of the superior commander as the chairman and two other officers, except that where the accused person is a warrant officer the board shall consist of the superior commander as chairman and two warrant officers."<sup>160</sup> Formerly a brigade commander used to deal with disciplinary cases alone. The rules of procedure at brigade level are similar to the rules mentioned above. A disciplinary board at this level may pass a sentence in which any one or more of the following punishments may be included:

- (1) Forfeiture of seniority;
- (2) Severe reprimand;
- (3) Reprimand; and
- (4) Fine.<sup>161</sup>

5. *Trial by Court-Martial*

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<sup>159</sup> *Id.*

<sup>160</sup> Act 105, *supra* note 7, § 64(1).

<sup>161</sup> *Id.* § 64 (3).

*a. Disciplinary Court-Martial*

In Ghana, there are two types of court-martial. A disciplinary court-martial has jurisdiction to try any service member who is alleged to have committed a service offense.<sup>162</sup> However, an officer can only be tried by a disciplinary court-martial with the approval of the Chief of the Defense Staff.<sup>163</sup> A disciplinary court-martial is composed of not less than three officers; however, where the accused person is an enlisted man a disciplinary court-martial will include two enlisted men.<sup>164</sup> Further, the Chief Justice may appoint a person to officiate as a judge advocate (military judge) at a disciplinary court-martial.<sup>165</sup>

The punishment that this court may award includes: imprisonment for less than two years; dismissal from the armed forces; reduction in rank, and fine. It must be pointed out that a legal officer normally prosecutes at the disciplinary court-martial and therefore the accused is permitted to engage counsel. It must be stressed that the armed forces does not provide the accused defense counsel. The accused, however, has a right of appeal.<sup>166</sup>

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<sup>162</sup> *Id.* § 71.

<sup>163</sup> AFR vol. II, *supra* note 9, art. 111.35 (2).

<sup>164</sup> Act 105, *supra* note 7, § 70 (1).

<sup>165</sup> *Id.* § 73.

<sup>166</sup> Act 105, *supra* note 7.

The disciplinary court-martial appears similar to special court-martial under the United States military justice system. A special court-martial has jurisdiction to try service members for any non-capital offense.<sup>167</sup> It usually consists of a military judge, trial counsel and defense counsel who will be detailed.<sup>168</sup> The court also includes not less than three officers and, where an enlisted accused requests, an enlisted member. With few exceptions, the procedures at disciplinary court-martial are similar to trial by a general court-martial (discussed below).

*b. General Court-Martial*

*(i) Convening Authority*

By virtue of the statutory power imposed in him, the President of Ghana or “such other authorities as may be authorized in that behalf by him may convene general courts-martial and disciplinary courts-martial.”<sup>169</sup> The other authorities who may convene courts-martial are indicated in the regulations as follows: (a) The Chief of the Defense Staff; (b) A Service Commander; or (c) A Brigade Commander.<sup>170</sup>

*(ii) Composition of General Court-Martial*

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<sup>167</sup> U.C.M.J. art. 19.

<sup>168</sup> *Id.* arts. 26, 27.

<sup>169</sup> Act 105, *supra* note 7, § 65 (1).

<sup>170</sup> AFR vol. II, *supra* note 9. art. 111.05.

A general court-martial consists of “not less than five officers and not more than such number of officers as may be prescribed, except that where the accused is (an enlisted) man a general court-martial shall include two enlisted men.”<sup>171</sup> The minimum number has been fixed by statute. However, the regulations have set out the maximum number of nine.<sup>172</sup> The convening authority issues the convening order which contains, among other things, the ranks and names of the president and members of the court-martial.<sup>173</sup> The convening authority has discretion in the membership of the court. However, not all members may be chosen from the service of the convening authority, it reduces the influence that the convening authority may otherwise exert on the court-martial.

*(iii) Eligibility to Serve on General Court-Martial*

A convening authority may appoint as members of the general court-martial, officers of the army, navy and air force of Ghana or officers of any armed forces, who are attached, seconded or loaned to the Ghana Armed Forces, and two enlisted men, where the accused person is an enlisted man.<sup>174</sup> Normally, the convening authority would not appoint as a member of a general court-martial an officer lower in rank than the rank of the

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<sup>171</sup> Act 105, *supra* note 7, § 66 (1).

<sup>172</sup> AFR vol. II, *supra* note 9, art. 111.18 (2). This article states: “No general court-martial shall consist of more than nine officers.”

<sup>173</sup> *Id.* art. 111.06.

<sup>174</sup> Act 105, *supra* note 7, § 65(2).

accused. The following persons are disqualified from sitting as members of a general court-martial:

- (a) The officer who convened the court-martial;
- (b) The prosecutor;
- (c) A witness for the prosecution;
- (d) The commanding officer of the accused person;
- (e) A provost officer;
- (f) An officer who is under the age of twenty-one years;
- (g) A officer below the rank of army Captain; or
- (h) Any person who prior to the court-martial participated in any investigation respecting the matters upon which a charge against the accused person is founded.<sup>175</sup>

*(iv) Appointment of Judge Advocate and Prosecutor*

Trial by general court-martial brings into sharp focus the relationship between the judiciary and the military justice system. From the trial stage through the Court-Martial Appeal Court to the Supreme Court one could see the co-operation between the civilian and the military justice systems.

Generally, an application is made to the Chief Justice of Ghana who is empowered to appoint a person to officiate as judge advocate at a general court-martial.<sup>176</sup> It may be noted, however, that the President has statutory power to appoint a

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<sup>175</sup> *Id.* § 69.

<sup>176</sup> *Id.* § 68.

person to be known as the Judge Advocate General of the Ghana Armed Forces “to officiate generally at courts martial as a judge advocate and to perform such other functions as the Commander-in-Chief may from time to time assign to him.”<sup>177</sup>

It is mandatory to appoint a prosecutor for each general court-martial. The convening authority may, with the concurrence of the Director of Legal Services, appoint a legal officer to act as prosecutor.<sup>178</sup> The prosecutor is enjoined, to the best of his ability, to “assist the court in the performance of its duties; and to ensure that no material fact in favor of the accused is suppressed.”<sup>179</sup> The accused, if he so desires, will be provided with a defending officer and an adviser. A defending officer may be any commissioned officer of the armed forces; an adviser may be any person irrespective of his status or rank. While the defending officer may focus on the “military” aspect of the case, the adviser assists the accused both before and during trial, in respect of any technical or specialized aspect of the case. It is the responsibility of the accused to retain counsel.<sup>180</sup>

*(v) Jurisdiction as to Persons*

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<sup>177</sup> *Id.* See also *supra* note 12.

<sup>178</sup> AFR vol. II, *supra* note 9, art. 111.23.

<sup>179</sup> *Id.* art. 112.54.

<sup>180</sup> *Id.* art. 111.60. Generally, if the government is challenging timeliness, the burden is on the government.

A general court-martial may “try any person subject to the code of service discipline who is alleged to have committed a service offense.”<sup>181</sup> In addition to service members, “every person not otherwise subject to the code of service discipline, who accompanies any unit or other element of the armed forces that is on service in any place may be tried by a general court-martial.”<sup>182</sup>

(vi) *Jurisdiction as to Offense*

A general court-martial has powers to try any service member for any service offense.<sup>183</sup> Among the service offenses are: Offenses relating to security,<sup>184</sup> prisoners of war,<sup>185</sup> operations,<sup>186</sup> mutiny;<sup>187</sup> desertion;<sup>188</sup> insubordinate behavior,<sup>189</sup> malingering<sup>190</sup> and disturbances.<sup>191</sup> No service tribunal has powers to try any person charged with murder, rape or manslaughter, committed in Ghana.<sup>192</sup> Thus if an offense of murder or

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<sup>181</sup> Act 105, *supra* note 7, § 67.

<sup>182</sup> *Id.* § 12(1)(e).

<sup>183</sup> AFR vol. II, *supra* note 9, art. 111.23.

<sup>184</sup> Act 105, *supra* note 7, § 16.

<sup>185</sup> *Id.* § 17.

<sup>186</sup> *Id.* § 18.

<sup>187</sup> *Id.* § 19.

<sup>188</sup> *Id.* § 27.

<sup>189</sup> *Id.* § 24.

<sup>190</sup> *Id.* § 34.

<sup>191</sup> *Id.* § 46.

<sup>192</sup> *Id.* § 79.

rape were committed outside Ghana a general court-martial would have jurisdiction to try the case.

*(vii) Jurisdiction as to Time*

The Armed Forces Act provides:

Except in respect of the service offense mentioned in sub-section (2), no person is liable to be tried by a service tribunal unless his trial begins before the expiration of a period of three years from the day upon which the service offense was alleged to have been committed.<sup>193</sup>

Offenses for which there is no statute of limitation are: mutiny, desertion or absence without leave or a service offense for which the maximum punishment that may be imposed is death.<sup>194</sup>

*(viii) Jurisdiction as to Punishment*

A general court-martial has powers to impose a wide range of punishments including: death penalty; imprisonment for two years or more; dismissal with disgrace from the armed forces; reduction in rank; forfeiture of seniority; reprimand and fine.<sup>195</sup>

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<sup>193</sup> *Id.* § 80 (1).

<sup>194</sup> *Id.* § 80 (2).

<sup>195</sup> *Id.* § 78 (1).



(ix) *Trial Procedure*

At the beginning of the trial, the court (president, members and the judge advocate), prosecutor, defense counsel and defending officer or adviser, if any, will assemble at the specified time and place.<sup>196</sup> The accused will be brought before the court under an escort. A medical report of the accused showing that he has been examined earlier that day will be presented to the court.<sup>197</sup>

The judge advocate will read to the accused the convening order, and inform him of the members who are to try him. Then the judge advocate will ask the accused whether he objects to being tried by any of the members whose names have been read.<sup>198</sup> If the accused objects to any of the members, the objection will be decided upon. However, if there is no objection or there is no merit in the objection, members of the court will be sworn and proceedings will then commence.

After members and interpreters, if any, have been sworn, the plea of the accused will be taken.<sup>199</sup> If he pleads not guilty to the charge, the prosecution and the defense may make opening statements highlighting the nature of their respective cases. The prosecution will then open its case by calling the prosecution witnesses one after the

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<sup>196</sup> AFR vol. II, *supra* note 9, art. 112.05.

<sup>197</sup> Apart from the convening order, the convening authority will issue out Administrative Instructions in which an administrative officer will be appointed. The administrative officer must ensure that the accused is examined daily by a medical officer before the court assembles.

<sup>198</sup> AFR vol. II, *supra* note 9, art. 112.05.

<sup>199</sup> *Id.* art.112.05.

other.<sup>200</sup> The prosecutor will conduct the examination-in-chief; followed by the cross-examination by defense counsel; and re-examination by the prosecutor.<sup>201</sup> Members of the court-martial may also ask questions as and when necessary.<sup>202</sup>

After the prosecution has closed its case, the defense may make a submission of “No Case”<sup>203</sup> or may decide to open their case by calling the accused and other defense witnesses to give their evidence.<sup>204</sup>

After evidence has been given from both the prosecution and the defense, and they have made their closing addresses to the court, the judge advocate will sum up the evidence, advise the court on the law relating to the case, and any special finding it may make.<sup>205</sup> The court will close to determine its findings. It is only the president and members of the court who will deliberate over the findings.<sup>206</sup>

If the finding on a charge against the accused is guilty, the court, before deliberating on the sentence, shall whenever possible take evidence of his age, rank and

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* art. 112.07.

<sup>204</sup> *Id.* art. 112.08.

<sup>205</sup> *Id.* art. 112.12

<sup>206</sup> *Id.* art. 112.13.

service record.<sup>207</sup> The service record will include: (a) any recognized acts of gallantry or distinguished conduct on the part of the accused and any decorations to which he is entitled; (b) particulars of any offense of which the accused has been found guilty during his service; (c) the accused family background and responsibilities and any other circumstances which may have made him more susceptible to the commission of the offense charged; and (d) his general conduct in the service.<sup>208</sup>

The accused may cross-examine any witnesses who give evidence on his family background and conduct. He may also give evidence on oath and call witnesses in mitigation of punishment and to his character. The court will then close to deliberate its sentence. The court will later re-open, after its deliberations, and announce its sentence to the accused and inform him that the punishment is subject to confirmation by the convening authority.<sup>209</sup>

Prior to any confirmation, the Judge Advocate General will advise the convening authority on the record of proceedings. If a convicted service member is not satisfied with the decision of the convening authority, he may submit a petition to the convening

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<sup>207</sup> *Id.* art.112.14.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

authority praying that his conviction be quashed.<sup>210</sup> If his petition fails, he may appeal to the Court-Martial Appeal Court.<sup>211</sup>

#### 6. *Court-Martial Appeal Court*

The Armed Forces Act provides a service member who has been tried and convicted by a court-martial the right to appeal to the Court-Martial Appeal Court (CMAC) on: “ (a) The legality of any or all of the findings; and (b) The legality of the whole or any part of the sentence.”<sup>212</sup> Judges of the court are judges of the civilian court of appeal.<sup>213</sup> The Constitution provides that the court of appeal is constituted by any three of the superior court of judicature.<sup>214</sup>

It is interesting to note that the Court-Martial Appeal Court has powers to “assign an appellant a lawyer in any appeal proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interest of justice that the appellant should have legal aid that he has not sufficient means to enable him to obtain that aid.”<sup>215</sup>

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<sup>210</sup> Armed Forces (Court-Martial Appeal Court) Regulations, § 4 (a) (Legislative Instrument, 622) (1969) [hereinafter L.I. 622].

<sup>211</sup> Act 105, *supra* note 7.

<sup>212</sup> *Id.*

<sup>213</sup> AFR vol.II., *supra* note 9, app. II, § 1.

<sup>214</sup> GHANA CONST. art. 136(2).

### 7. *Appeal to the Supreme Court*

A service member who is dissatisfied with the judgment of the Court-Martial Appeal Court has further right under the Constitution to appeal to the Supreme Court. The Constitution provides:

An appeal shall lie from the judgment of the Court of Appeal to the Supreme Court as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction.<sup>216</sup>

It is necessary to mention that courts-martial were not created under chapter eleven of the Constitution dealing with the Judiciary. Military tribunals were established under chapter five. Even though, no court-martial has been mentioned in the article above the fact still remains that the Supreme Court has supervisory jurisdiction over all courts and over any adjudicating authority in Ghana.<sup>217</sup>

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<sup>215</sup> L.I. 622, *supra* note 210, § 8 (1).

<sup>216</sup> GHANA CONST. art. 131 (1) (a).

<sup>217</sup> *Id.* art.132.

### III. Deficiencies in Ghana's Military Justice System

#### A. Manpower and Restructuring of Judge Advocate General and Legal Departments

One of the critical areas of the military justice system in Ghana is manpower. The Directorate of Legal Services is a tri-service unit providing legal assistance and advice to the army, navy and air force, not only at headquarters level but also at brigade or equivalent levels. With the expansion of the armed forces and the increase and complexity of their roles and functions, the need for adequate and well-motivated legal officers (judge advocates) cannot be over-emphasized.

Indeed the manpower deficiency was recognized by a board convened to re-structure the Directorate of Legal Services and the Office of the Judge Advocate General. In its report the board stated in part: "The increase in the volume of work and diversity of the nature of work at the Legal Directorate has brought to the fore the need to increase the number of Service Legal Officers and equip them with the relevant expertise."<sup>218</sup>

In 1969, when the Office of the Judge Advocate General was established no expansion was envisaged.<sup>219</sup> It was a one-man office. The law empowered the President of Ghana "to appoint a person to be known as the Judge Advocate General of the Ghana

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<sup>218</sup> REPORT OF THE BOARD ON RESTRUCTURING OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL AND THE DIRECTORATE OF LEGAL SERVICES (2000) [hereinafter RESTRUCTURING BOARD REPORT].

<sup>219</sup> Act 105, *supra* note 7.

Armed Forces to officiate generally at courts-martial as a judge advocate ...”<sup>220</sup> Over the years, the Judge Advocate General has not been able to perform his statutory functions as judge advocate (military judge). Simply because if he does that he will be performing two roles that are incompatible: one as judge advocate (military judge), and also as an adviser (staff judge advocate) to command on court-martial proceedings.<sup>221</sup> To solve this problem, the provision empowering the Chief Justice to appoint a person to officiate as judge advocate at courts-martial is always invoked.<sup>222</sup>

Apart from the manpower issues, the restructuring of the office of the Judge Advocate General and the Directorate of Legal Services is imperative. Until 1996, both the Judge Advocate General and the Director of Legal Services were responsible to the Chief of the Defense Staff. The restructuring board made the following remarks in its report:

The placement of both the offices of the Judge Advocate General and the Directorate of Legal services under the General Headquarters of the Ghana Armed Forces has been identified as duplication. The ability of the office of the Judge Advocate General to provide constructive comments on legal issues emanating from the General Headquarters of which it was part was also greatly hampered. In effect the Judge Advocate General sat in judgment of issues that he directly or indirectly initiated.<sup>223</sup>

The board later concluded:

There is a requirement for establishment of a superior legal structure over and above the legal structure at General Headquarters to provide

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<sup>220</sup> *Id.*

<sup>221</sup> AFR vol. II, *supra* note 9, art.112.53.

<sup>222</sup> Act 105, *supra* note 7, § 68.

<sup>223</sup> *See* RESTRUCTURING BOARD REPORT, *supra* note 206.

supervision and have general oversight responsibilities of the legal system and activities within the Ministry of Defense. The office of the Judge Advocate General operating under the Ministry of Defense shall be adequate to meet this requirement.<sup>224</sup>

The roles and functions of the Judge Advocate General were delineated in 1996.<sup>225</sup> He now reports to the Minister of Defense. This will enable him to comment dispassionately on activities at the General Headquarters. The Directorate of Legal Services which seems to run on parallel lines with the Office of the Judge Advocate General must be brought under the office of the Judge Advocate General. In other words, there must be a single legal structure headed by the Judge Advocate General. Significantly, the Judge Advocate General is provided with tenure of service.<sup>226</sup> This will ensure his independence and insulate him from undue command influence.

#### B. Lack of Education on the Military Justice System

A man who does not know his rights may not be able to safeguard or fight for them when they are being trampled upon. To sharpen awareness of military law and other related matters, the Legal Directorate of the Ghana Armed Forces has been organizing annual legal seminars. This became necessary when enlisted men were made to participate in trials. There are also military law courses in each year. More service

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<sup>224</sup> *Id.*

<sup>225</sup> Ministry of Defense Instructions, 1 (1996).

<sup>226</sup> *Id.* § 73A (2). This section states: "The conditions of service of the Judge Advocate General shall, so far as practicable be the same as those applicable to judges of the High Court or the Court of Appeal . . ." *Id.* See also GHANA CONST. art. 146 (1) which states: "A justice of the Superior Court or a chairman of a Regional Tribunal shall not be removed from office except for stated misbehavior or incompetence or on ground of inability to perform the functions of his office arising from infirmity of body or mind."



members will be encouraged to attend such programs. Education of troops on the military justice system is necessary in the administration of military justice.

The education must not be limited to junior officers. Senior officers and commanders must be exposed to the concept that military justice can co-exist with and reinforce discipline. Commanders are responsible for discipline in their units or installations. As stated earlier, discipline is enhanced where there is fairness; and this in turn will serve as a motivating factor in the pursuit of the military mission. The annual legal seminars that are organized for updating the knowledge of service members must be intensified.

#### C. Pre-trial Deficiencies

The most important aspect of pre-trial issues is the taking of a summary or abstract of evidence. A summary of evidence provides the facts that will support the necessary ingredients in a charge; yet the accused is not provided with the requisite facilities to prepare his defense adequately.

First, the accused is not represented. A defense counsel may be present only to advise the accused, but cannot cross-examine witnesses. Cross-examination is left to the accused. Effective cross-examination, it is argued, can elicit the facts that may enable the accused to adequately prepare his defense. It goes without saying, therefore, that this lack of representation is an important hiatus in the administration of military justice in Ghana.

Furthermore, the accused may present evidence and call witnesses in his defense. However the officer taking the summary cannot cross-examine the witnesses. It is worth observing that the taking of a summary is similar to Article 32 Investigation under the U.S. Uniform Code of Military Justice. Both are fact-finding investigations.<sup>227</sup> The differences are, however, remarkable. In the case of Article 32 investigation, the accused is not only present but his counsel is allowed to cross-examine the witnesses.

The investigation officer is also required to "examine available witnesses requested by the accused."<sup>228</sup> In re United States v. Payne, the court viewed the role of the investigating officer as that of a judicial officer.<sup>229</sup> It has been observed: "in many US commands military lawyers will routinely sit as investigating officers."<sup>230</sup> The procedure for taking summary of evidence needs reform.

Summary trials at battalion and brigade levels take the form of investigation. They are non-judicial, and the form of punishment the disciplinary boards may impose is disciplinary in nature.<sup>231</sup> An accused service member is not represented, and he has no

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<sup>227</sup> U.C.M.J. art. 32(a) states in part: "No charge or specification may be referred to a general court-martial for trial until *a thorough and impartial investigation* of all the matters set forth therein has been made." *Id.* (emphasis added).

<sup>228</sup> *Id.* art.32(b).

<sup>229</sup> United States v. Payne, 3 M.J. 354 (C.M.A.1977).

<sup>230</sup> DAVID A.SCHLUETER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURES 318 (5<sup>TH</sup> ed 1994).

<sup>231</sup> Act 105, *supra* note 7.

right of appeal. He may, however, submit a petition for redress.<sup>232</sup> In addition, the accused must be given right of appeal.

#### D. General Court-Martial

##### 1. *Defense Counsel and Military Judges*

Under the military justice system in Ghana, a general court-martial is empowered to try any service member for a service offense.<sup>233</sup> A legal officer (trial counsel) prosecutes the case. The military does not provide the accused with defense counsel. The accused is, however, permitted to provide defense counsel.<sup>234</sup>

It is interesting to note that the accused is entitled to a defending officer and an adviser.<sup>235</sup> Arguably, a defending officer who is not a trained legal officer will not be effective in helping the accused in his defense, especially in serious and complicated cases. An adviser also cannot participate in the proceedings. The only option for an accused is to obtain the services of civilian defense counsel.

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<sup>232</sup> AFR vol. I, *supra* note 110.

<sup>233</sup> Act 105, *supra* note 7.

<sup>234</sup> AFR vol. II. *supra* note 8, art. 111.60.

<sup>235</sup> *Id.* art. 111.60 (providing the accused with a defending officer who may be "any commissioned officer; however, an adviser may be of any rank or may be a civilian. The adviser assists the accused, both before and during trial in respect of any technical or specialized aspect of the case. He is not permitted to take any part in the proceedings before the court.").

While there are some advantages in securing the services of a civilian legal practitioner, it has not always been convenient and satisfactory. One advantage that a civilian defense counsel may have is that it will be difficult to influence him. However, many civilian lawyers are not familiar with the military law. It is, therefore, most opportune that Ghana's Parliament has recognized the need and called on the military authorities to address this issue.<sup>236]</sup>

The call by Parliament is not only to satisfy the wishes of the populace and the desire of service members, but it is also to meet constitutional demands.<sup>237</sup> The Constitution stipulates that an accused must be "permitted to defend himself before the court in person or by a lawyer of his choice".<sup>238</sup> Many service members cannot afford the legal fees. It is important to note, however, that framers of the Constitution foresaw this problem with respect to legal fees and made provision for legal aid.<sup>239</sup>

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<sup>236</sup> GHANA PARL. DEB., *supra* note 7.

<sup>237</sup> GHANA CONST. art. 19 (providing for fair trial).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* art.294. This article states *inter alia*:

- (1) For the purposes of enforcing any provision of this Constitution, a person is entitled to legal aid in connection with any proceedings relating to this Constitution if he has reasonable for taking, defending, prosecuting or being a party to the proceedings.

....

- (4) For the purposes of this article, legal aid shall consist of representation by a lawyer, including all such assistance as is given by a lawyer, in the steps preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.

*Id.*

Under the legal aid scheme, an accused, after satisfying certain requirements, is provided with defense counsel. It is contended that military defense counsel will be more effective in helping the accused in his defense. To provide defense counsel for accused service members, one problem needs to be considered. Commanders must accept the new concept (of military defense counsel) so that officers assigned the responsibility of defense counsel will be able to perform their duties without any inhibition.

When the concept of summary trials by disciplinary boards was first introduced, commanding officers who were used to trying offenders alone expressed misgivings. Their perception was that command responsibility with respect to discipline would be compromised. Suffice it to say that the introduction of disciplinary boards has not adversely affected discipline in the armed forces.

It is observed that some officers have not readily accepted the concept of military defense counsel. To such officers the establishment of an office for military defense counsel will affect unit cohesiveness and undermine discipline. Their views seem to reflect the remarks of General Wilkinson after the trial of Captain Wilson in 1809. Looking at the fact that Captain Wilson was represented by civilian counsel, the General asked, among other things: "Shall counsel be admitted on behalf of a Prisoner before a General Court-Martial, to interrogate, to except, to plead, to tease, perplex,[and] embarrass by legal subtleties [and] abstract sophistical Distinctions?" <sup>240</sup>

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<sup>240</sup> Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958).

General Wilkinson's observation might carry some weight in an era when the military was "command-discipline" based. It will not be relevant in present circumstances. To safeguard the interest of officers who will be assigned the responsibility of defense counsel the Armed Forces Regulations should be amended to provide them with certain guarantees. For example, their promotions should not suffer, and no authority should be permitted to admonish any defense counsel in the performance of his functions. The creation of the office of defense counsel under the office of the Judge Advocate General will undoubtedly enhance military justice.

Another issue that calls for examination is the question of judge advocates (military judges) who are to officiate at courts-martial. Presently, the Chief Justice appoints High Court judges to officiate at general courts-martial.<sup>241</sup> These judges are provided security of tenure under the Constitution:

(1) In the exercise of judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to the Constitution and shall not be subject to the control or direction of any person or authority.

(2) Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person shall interfere with judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.<sup>242</sup>

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<sup>241</sup> Act 105, *supra* note 7.

<sup>242</sup> GHANA CONST. art. 127.

While these judges are protected from unlawful command influence, it is not always convenient to obtain their services. They would always want to dispose of court-martial cases as quickly as possible to enable them go back to deal with cases pending before them. It is also difficult for them to travel to areas of operation outside the country to sit on cases.

For instance, in 1990, a service member, who was on peacekeeping duties in Liberia, killed a Liberian, and after investigations, he was charged with murder.<sup>243</sup> It was found that it would not only be more cost-effective for a court-martial to sit in Liberia where witnesses were readily available but also more convenient. Difficulty in getting a judge advocate to travel to Liberia resulted in transporting all the witnesses to Ghana for the court-martial. It would have been easier if the Ghana armed forces had had military judges.

The solution to this problem is to strengthen the office of the Judge Advocate General to enable the office undertake the responsibilities of judge advocates (military judges). As an interim measure, one or two judges of the High Court should be assigned permanently to the military for court-martial duties.

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<sup>243</sup> Private Fred Polkuu v. The State, 19 C.M.A.(1992).

## *2. Convening Authority*

Under Ghana's military justice system, there is no statute or regulation similar to Article 37 of the U.C.M.J. On one occasion, a commander, apparently dissatisfied with the sentence of a court-martial, released the members from the armed forces.<sup>244</sup> Such a provision would prevent any convening authority from taking arbitrary action against members of courts-martial.

Furthermore, even though convening authorities use factors like seniority, age, experience and length of service in appointing members of a court-martial, Ghana's military justice system lacks a provision that spells out criteria as detailed under the US military justice system.<sup>245</sup> In sum, the deficiencies cover structure of the military justice system; lack of certain relevant provisions and manpower.

## *IV. American Military Justice System Practice and Procedures Relevant to Ghana's Military Justice System*

There are statutory provisions under the American Uniform Code of Military Justice that are relevant to the military justice system in Ghana. The pre-trial investigation is more detailed and offers greater procedural protection for the accused.<sup>246</sup>

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<sup>244</sup> The State v. LTC. John Ackon, GCM, (1986) (unreported).

<sup>245</sup> U.C.M.J. art. 25 (specifying age, education, training, experience, length of service and judicial temperament).

<sup>246</sup> U.C.M.J. art. 32.



The accused has right to be represented by counsel who may cross-examine the prosecution witnesses.<sup>247</sup> Defense witnesses may also be cross-examined by the investigating officer. At the end of the investigation the investigating officer is required to submit a report with his recommendations as to the disposition of the charges.<sup>248</sup>

A military judge is detailed to each general court-martial.<sup>249</sup> The military judge is directly responsible to the Judge Advocate General, or his designee of the arm of service to which the military judge is a member. Apart from trial counsel, defense counsel is detailed for every general court-martial.<sup>250</sup> More importantly, members of the court are protected against unlawful command influence.<sup>251</sup>

## V. Mechanism for Changing Ghana's Military Justice System

### A. Mechanism for Amending Statutes and Regulations

The Constitution of Ghana has provided for Armed Forces Council presided over by the President or his nominee (usually the Vice-President).<sup>252</sup> The Council is empowered, with the prior approval of the President, by constitutional instrument, "to

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<sup>247</sup> *Id.*

<sup>248</sup> MANUAL FOR COURTS-MARTIAL, R.C.M. 405 (d)(1) (2000) [hereinafter MCM].

<sup>249</sup> U.C.M.J. art. 26.

<sup>250</sup> U.C.M.J. art. 27.

<sup>251</sup> U.C.M.J. art. 37.

<sup>252</sup> GHANA CONST. art. 211.

make regulations for the performance of its functions under this constitution or any other law, and for the effective and efficient administration of the Armed Forces.”<sup>253</sup> Any proposed amendments to the Armed Forces Regulations will be submitted in the form of a memorandum to the Chief of Staff at the General Headquarters for his study.

The Chief of Staff will submit further memorandum to the Chief of the Defense Staff for his consideration. The Minister of Defense will be notified of the proposals, and, where he is satisfied with the proposals, he will bring them before the Armed Forces Council for discussion. Meanwhile the Judge Advocate General may have given legal advice on the proposed amendments. The Attorney General is also notified of the proposals. If a statute is to be amended, the appropriate Parliamentary committee will be furnished with a copy of the proposals for the necessary Parliamentary process.

## B. Proposed Statutes and Regulations to be Amended

### *1. Office of the Judge Advocate General*

Section 73A of the Armed Forces Act is hereby substituted with the following new section:

- (1) There shall be Office of the Judge Advocate General which shall consist of:*
  - (a) The Judge Advocate General;*

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<sup>253</sup> *Id.* art. 214 (2).

*(b) Two Deputy Judge Advocates General ; and*

*(c) Such number of Assistants and other personnel as the Judge Advocate General, in consultation with the Minister of Defense, may decide.*

*(2) The Commander-in-Chief of the Ghana Armed Forces may, after consultation with the Chief Justice, appoint the Judge Advocate General and the two deputies whose conditions of service shall, so far as practicable, be the same as those applicable to judges of the High Court or the Court of Appeal, so however that the remuneration of the Judge Advocate General and his deputies and assistants shall be paid out of the funds of the Ghana Armed Forces.*

*(3) The functions of officers of the Office of the Judge Advocate General shall include the following:*

- (a) Officiate as judge advocate (military judge) at courts-martial;*
- (b) Undertake prosecution of cases before courts-martial;*
- (c) Act as counsel for service members being investigated at summary of evidence, or charged before courts-martial; and*
- (d) Perform such functions as the Judge Advocate General may authorize.*

## *2. Pre-Trial Matters – Summary of Evidence*

In connection with taking of summary of evidence, Article 109.02 (2) (a) of the Armed Forces Regulations vol. II is hereby amended to read as follows:

*(a) A summary of evidence shall be taken in the presence of the accused by the commanding officer or by another officer on the direction of the commanding officer. The accused has right to be represented by counsel. The accused or his counsel shall have the right to cross-examine prosecution witnesses. The officer taking the summary shall have the right to cross-examine defense witnesses.*

## *3. Court-Martial Trial*

Article 111.23 of AFR vol. II is hereby substituted with the following:

*The Judge Advocate General shall detail a judge advocate, a prosecutor and defense counsel for each court-martial.*

To prevent unlawful command influence the following section should be inserted immediately after section 67 of the Armed Forces Act, Act 105:

*67A. No authority convening a court-martial, nor any other person may censure, reprimand, or admonish the court or any member, judge advocate, or counsel thereof, with respect to the findings or sentence imposed by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to the Code of Service Discipline may attempt to coerce or , by any unlawful means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.<sup>254</sup>*

These proposed amendments, it is contended, capture the wishes of many a service member, and concerns of Parliament. The proposals provide the accused with the facilities that will enable him to prepare adequately for his defense.

## VI. Impact of Change on the Military Justice System in Ghana

The proposals will create a single legal structure with various responsibilities and functions. The present Directorate of Legal Services will be abolished and its functions absorbed by the proposed Office of the Judge Advocate General. This will eliminate the

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<sup>254</sup> U.C.M.J. art. 37. This article has been modified to suit Ghana's context.

confusion that exists between the Office of the Judge Advocate General and the Directorate of legal Services as to their functions. The proposed provision of counsel for service members at the taking of summary of evidence or at courts-martial is a novelty, and this will enhance the military justice system.

Further, the statutory protection that officers of the Office of the Judge Advocate General will be granted will embolden and motivate them to work diligently and to the best of their ability. It is envisaged that the success of the new proposals will be similar to the achievements of the Trial Defense Service when it was established in the US military justice system. The following observation is pertinent:

First it [Trial Defense Service] provided better protection for defense counsel against actual or potential threats to their professional independence .It reduced the number of opportunities for improper command influence to occur and made their success less likely even if they were attempted. Moreover, it deterred self-imposed limitations on professional independence by defense counsel who feared command reactions.

....

Secondly, TDS' establishment improved the perception of the defense function in the Army ....<sup>255</sup>

## VII. Conclusion

This paper has traced the history and development of the judicial and military justice systems in Ghana from the nineteenth century. It has also examined the social and

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<sup>255</sup> LTC John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 Mil. L. Rev. 1, 46 (1983).

political factors that have impacted on the two systems. It has suggested proposals to improve the military justice system in Ghana.

The military justice system in Ghana owes its existence to the colonial history of the country. The British established the foundations of the Ghana Armed Forces; and before Ghana's independence in 1957 the British military law was used to administer the armed forces.<sup>256</sup> The present military justice system is rooted in the Constitution of Ghana that created not only the armed forces,<sup>257</sup> but also instituted the military tribunals.<sup>258</sup> Furthermore, the Constitution established the Armed Forces Council whose functions included making regulations for the administration of the armed forces.<sup>259</sup> The Armed Forces Act provides for persons subject to the code of service discipline;<sup>260</sup> various service offenses; and service tribunals to deal with offenders.<sup>261</sup>

In addition, the Armed Forces Regulations, made under the Armed Forces Act, provide the regulatory procedures for service trials. There are four service tribunals: the two disciplinary boards at battalion and brigade levels exercise summary jurisdiction.<sup>262</sup>

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<sup>256</sup> Army Act, 1955.

<sup>257</sup> GHANA CONST. art.210 (1).

<sup>258</sup> *Id.* art. 19(19).

<sup>259</sup> *Id.* art. 214.

<sup>260</sup> Act 105, *supra* note 7, § 12.

<sup>261</sup> *Id.* §§ 63, 64, 67, 71.

<sup>262</sup> *Id.*

The other two service tribunals are the disciplinary court-martial and the general court-martial.<sup>263</sup>

Every trial starts with an investigation.<sup>264</sup> The commanding officer convenes a disciplinary board to investigate the allegations against the service member. Where there is substance in the allegation and the service member is an enlisted man below the rank of warrant officer, the trial may be conducted by a disciplinary board presided by the commanding officer or a delegated officer.

It must be explained, however, that the commanding officer may have the jurisdiction to deal with the case, but he will nonetheless send the case to higher authority because of the gravity of the offense and other surrounding circumstances.<sup>265</sup> The service member may also elect to be tried by court-martial. Where the commanding officer has to send the case to higher authority, he must take or cause a summary of evidence to be taken.<sup>266</sup>

The summary of evidence will be taken in the presence of the accused who may cross-examine the prosecution witnesses. He may give evidence, make a statement or remain silent.<sup>267</sup> It is important to note that the summary of evidence deals with the facts

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* § 62.

<sup>265</sup> *Id.* § 63.

<sup>266</sup> AFR vol. II, *supra* note 9, art. 109.01.

<sup>267</sup> *Id.* art.109.02.



on which the alleged offender may be charged and prosecuted. The powers of punishment of a general court-martial are severe. Yet the accused is not permitted counsel to represent him. This is an anomaly that needs to be corrected.

When a superior commander receives the summary of evidence, he may deal with the case if the accused is an officer below the rank of Lieutenant Colonel or a warrant officer.<sup>268</sup> The summary trials are non-judicial and no legal officer is involved with the trials. However, if the case is to be tried by a court-martial, a copy of the summary of evidence will be sent to the Directorate of Legal Services for pre-trial advice.<sup>269</sup> If the legal advice shows that there is *prima facie* case against the accused, higher authority will take steps to bring the case for trial.<sup>270</sup>

In preparing his pre-trial advice on the summary of evidence, the legal officer has to examine many factors including: ingredients in the offense; jurisdiction of the court-martial as to the accused; jurisdiction as to the offense charged; jurisdiction as to time; and jurisdiction as to punishment. It is worth-noting that a general court-martial is empowered to try any service member charged with any service offense.<sup>271</sup> However, a

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<sup>268</sup> Act 105, *supra* note 7, § 64.

<sup>269</sup> AFR vol. II, *supra* note 9, art. 109.07.

<sup>270</sup> *Id.*

<sup>271</sup> Act 105, *supra* note 7, § 67.

disciplinary court-martial may normally try enlisted men.<sup>272</sup> An officer may be tried by a disciplinary court-martial only with the authority of the Chief of the Defense Staff.<sup>273</sup>

The pre-trial advice is forwarded to the convening authority for his action. If, upon the advice, the convening authority considers that a general court-martial should try the case, he will issue out a convening order which is the authority for the court to sit. The convening order contains the ranks and names of the president and members of the court.<sup>274</sup> A general court-martial is composed of not less than five officers, except that where the accused is an enlisted man, the membership must include two enlisted men.<sup>275</sup>

The inclusion of enlisted men is a recent phenomenon that has its origin in the public tribunal concept introduced after the 1981 military intervention in the administration of the country.<sup>276</sup> A judge advocate (military judge) is always appointed by the Chief Justice to officiate at each general court-martial.<sup>277</sup> Further, a legal officer is detailed as a prosecutor to prosecute the case.<sup>278</sup> Significantly, the accused service member is not provided military defense counsel; he is, however, permitted to hire a

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<sup>272</sup> *Id.* §71.

<sup>273</sup> AFR vol. II, *supra* note 9, art. 111.35(2).

<sup>274</sup> *Id.* art. 111.06.

<sup>275</sup> Act 105, *supra* note 7, § 66 1).

<sup>276</sup> DA PAM. 550-153, *supra* note 4.

<sup>277</sup> Act 105, *supra* note 7, § 68.

<sup>278</sup> AFR vol. II, *supra* note 9, art. 111.23.

civilian defense counsel. If the accused does not have the capacity to afford legal fees, he is assisted to apply for legal aid.<sup>279</sup>

In 1997, Ghana's Parliament observed that it was not satisfactory that the military did not provide military defense counsel for accused service members.<sup>280</sup> In short, Parliament called on the military authorities to address this anomalous situation. A board was later convened to re-structure the legal services. It is hoped that this concern would be addressed expeditiously.

Under the Constitution, an accused is guaranteed certain rights including: a fair hearing within a reasonable time;<sup>281</sup> be informed of the nature of the offense charged;<sup>282</sup> be given adequate time and facilities to prepare his defense;<sup>283</sup> be permitted to defend himself before the court in person or by a lawyer of his choice;<sup>284</sup> and be afforded facilities to examine in person or by his counsel, the prosecution witnesses.<sup>285</sup> It is emphasized that a person who is commissioned or enlisted into the military is not necessarily deprived of these constitutional guarantees. Indeed Parliament has indicated

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<sup>279</sup> GHANA CONST. art.294.

<sup>280</sup> GHANA PARL. DEB. *supra* note 8.

<sup>281</sup> GHANA CONST. art. 19.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

that an accused service member must be provided all the facilities under the Constitution to defend himself.<sup>286</sup>

These constitutional and other statutory guarantees have diminished the control and influence that commanders used to wield. In spite of this, the commander or convening authority has a great deal of authority in the military justice system. For instance, in addition to appointing members of the court, he has right to approve or disapprove the findings and sentence of the court-martial.<sup>287</sup>

It must be stated that a convening authority should not be allowed to exert unlawful influence on the court-martial. To permit this is to undermine the judicial process. It is a commander's responsibility to maintain good order and discipline in his unit or installation. This can nevertheless be done without sacrificing justice and fairness. In short, it has been realized that discipline and justice can co-exist and complement each other.<sup>288</sup>

A service member who is not satisfied with a decision of a court-martial and the review of the convening authority may appeal to the Court-Martial Appeal Court.<sup>289</sup> The ordinary Court of Appeal is constituted as the Court-Martial Appeal Court.<sup>290</sup>

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<sup>286</sup> GHANA PARL. DEB. *supra* note 8.

<sup>287</sup> AFR vol. II, *supra* note 9, art. 114.15.

<sup>288</sup> THE POWELL COMMITTEE REPORT, *supra* note 88.

<sup>289</sup> Act 105, *supra* note 7.

<sup>290</sup> LI 622, *supra* note 210.

Furthermore the Registrar of the Court of Appeal becomes the Registrar for purposes of appeals to the Court-Martial Appeal Court. It is composed of at least three justices.<sup>291</sup>

It is interesting to note that whereas a court-martial has no powers to provide an accused service member with defense counsel. The Court-Martial Appeal Court is empowered to provide an appellant with counsel.<sup>292</sup> This is done through the legal aid scheme. A convicted service member is not limited to the Court-Martial Appeal Court. He has right to appeal to the highest court of the land. The Supreme Court “ has supervisory jurisdiction over all courts and over any adjudicating authority.”<sup>293</sup>

Looking at the cooperation that the military enjoys from the judiciary, one can say that there is a healthy relationship between the judicial system and the military justice system. The two systems have a common umbilical cord in the English common law.<sup>294</sup> The Chief Justice appoints judges to officiate as judge advocates (military judges) at courts-martial.<sup>295</sup> Moreover, the civilian Court of appeal becomes the Court-Martial Appeal Court to hear appeals from courts-martial. The Chief Justice may also preside over the Supreme Court to hear further appeals from the Court-Martial Appeal Court.<sup>296</sup>

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<sup>291</sup> *Id.* § 2.

<sup>292</sup> *Id.* § 8.

<sup>293</sup> GHANA CONST. art.132.

<sup>294</sup> TWUMASI CRIMINAL LAW, *supra* note 21.

<sup>295</sup> Act 105, *supra* note 7.

Since independence, there have been improvements in the military justice system in Ghana. Having examined the US military justice system, one can easily see certain components of the US military justice system that will be of relevance to Ghana's military justice system: providing accused with military counsel during investigations and at courts-martial; and an enactment to prevent a convening authority or any person from unlawfully influencing the court-martial process.

Finally, it is submitted that the old concept of hard military discipline has given or is giving way to discipline that is structured on justice and fairness. The need for change in Ghana's military justice system is overwhelming. The change will enhance the capacity of the military justice system and promote discipline in the armed forces. The change will also boost the morale of troops; and service members will thus be prepared for the military mission.

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<sup>296</sup> GHANA CONST. art. 128 (3).